IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RAMON VILLANUEVA-BAZALDUA, individually and on behalf of others similarly situated,	)	
Plaintiff,	)	
v.	)	Civil Action No.: 06-185 GMS
TRUGREEN LIMITED PARTNERS and, TRUGREEN, INC., d/b/a TRUGREEN CHEMLAWN,	)	
Defendant.	)	

DEFENDANT'S SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF ITS OPPOSITION TO PLAINTIFF'S EXPEDITED MOTION TO CONDITIONALLY CERTIFY A FLSA COLLECTIVE ACTION

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Dated: November 3, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

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I. INTRODUCTION

Plaintiff Ramon Villanueva ("Plaintiff"), the sole named plaintiff in this action, purports to bring this action against Defendant TruGreen Limited Partnership d/b/a/ TruGreen Chemlawn ("TruGreen") on behalf of himself and what he conclusorily deems "all other similarly situated H-2B workers" currently or formerly employed by TruGreen. More specifically, Plaintiff seeks to certify a collective action under Rule 216(b) of the Fair Labor Standards Act ("FLSA") as to his claims that – even in the absence of any specific legal obligation to do so – TruGreen unlawfully failed to compensate him or other H-2B workers for certain expenses incurred with their respective H-2B employment. He also seeks to represent the same class of individuals as to

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[1] The correct legal name is TruGreen Limited Partnership.

[2] TruGreen, Inc. was not Plaintiff's employer, and therefore, is not a proper party in this action.

[3] TruGreen, Inc. does not do business as (d/b/a) TruGreen ChemLawn; TruGreen Limited Partnership does do business as (d/b/a) TruGreen ChemLawn.

a hodgepodge of contract-based claims, all of which are premised on Plaintiff's allegations that certain promises made to him in Mexico regarding his wages and certain perquisites that he would receive when he arrived in the United States as an H-2B worker were altered by TruGreen once Plaintiff arrived at his branch in Wilmington, Delaware.

By seeking to represent himself and all other H-2B workers for all of these claims, Plaintiff alleges – as he must – that he and his claims are "similarly situated" to the claims of other H-2B workers. See generally Moeck v. Gray Supply Corp., No. 03-1950, 2006 WL 42368, at *4 (D.N.J. Jan. 6, 2006). Recognizing his burden of proof on that point, Plaintiff filed the pending Expedited Motion to Conditionally Certify An FLSA Collective Action. In addition, if he is to maintain a class action as to his contract-based claims, Plaintiff ultimately will need to satisfy, among other things, the commonality and typicality standards under Rule 23 of the Federal Rules of Civil Procedure, which standards necessarily involve an analysis strikingly similar to the "similarly situated" analysis under the FLSA. He also will need to demonstrate that he can meet the adequacy standards essential to serving as a class representative. However, Plaintiff made clear during his October 5 deposition that he cannot possibly meet any of those standards.

Far from being a routine deposition of an adequate and informed class representative, Plaintiff invoked the Fifth Amendment as to every question relating to his employment in the United States subsequent to his employment with TruGreen, which ended voluntarily in July 2004. As may be obvious, TruGreen's counsel was surprised at Plaintiff's steadfast refusal to answer questions that clearly related to the allegations in the Complaint *he* chose to file. His refusal to answer questions relating to his employment in the United States subsequent to his employment with TruGreen necessarily implicates his credibility and capability to adequately

represent the interests of others and therefore, his ability to serve as a named Plaintiff in any type of collective action.

Moreover, the testimony that he did provide only further reinforced the other arguments as to why this matter is not appropriate for collective treatment under the FLSA or even for class-wide treatment as to the breach of contract and related claims. In short, by Plaintiff's own admissions and explanations, he cannot demonstrate even the basic factual showing that his claims and those of the other putative plaintiffs are similarly situated let alone common or typical. Accordingly, TruGreen respectfully submits this Supplemental Brief to highlight how Plaintiff's admissions under oath undermine, as a matter of law, his improper effort to open to nationwide discovery and class-wide treatment what, at best constitutes his individualized action against TruGreen.

II. ARGUMENT

A. Plaintiff's Refusal to Answer Questions at His Deposition Precludes Him From Serving As a Lead Plaintiff in a Class or Collective Action.

Federal Rule of Civil Procedure 23(a)(4) requires that the representative plaintiff be willing and able to prosecute an action vigorously and to adequately represent the interests of others. After hearing Plaintiff's deposition testimony, TruGreen has serious concerns about both his ability and his willingness to adequately represent the interests' of others, and seriously doubts that he is similarly situated to other H2-B workers his counsel seeks to represent.[4]

First, by invoking the protection of the Fifth Amendment of the United States Constitution, Plaintiff refused to answer at least six questions regarding whether or where he worked in the United States in the years after his employment with TruGreen and how many

[4] In addition, Plaintiff's status necessarily impacted the conduct of the deposition, as Plaintiff's counsel warned TruGreen's counsel that Plaintiff "ha[d] to catch an airplane to Mexico [so] [t]he deposition has to be end (sic) by 2:30." (Villanueva Tr. pp. 16-17.)

hours he worked for any U.S. employer after TruGreen. As further explained by his counsel, Plaintiff intended to invoke the Fifth Amendment "for any question like that." (Transcript of Ramon Villanueva, Oct. 5, 2006 (hereinafter "Villanueva Tr."), pp. 12-16, 22-23, 30-33.)[5] Although Plaintiff acknowledged that he has never held any other H-2B positions after TruGreen (Villanueva Tr. p. 22), he unequivocally refused to answer whether any employer for whom he worked in 2006 paid his travel- or visa- related expenses, as he contends in his Complaint TruGreen should have done. (Villanueva Tr. pp. 31-33.)

As a result, Plaintiff effectively precluded TruGreen from fully exploring questions that go directly to his ability to serve as a lead plaintiff purportedly representing the interests of others in this case. For example, TruGreen has a genuine and legitimate interest in understanding Plaintiff's work visa status, or lack thereof, and whether there are any circumstances that may preclude Plaintiff in the future from traveling freely to the United States. By invoking the Fifth Amendment to these basic and foundational questions, TruGreen (and this Court) lack any understanding of and have been deprived of any future opportunity to understand whether Plaintiff might not, at some point in the future, be able to legally return to the country for hearings, depositions, mediation, settlement conferences, or even for trial. If Plaintiff cannot be candid in these proceedings or fully participate in them, he simply cannot be and is not an adequate representative. See, e.g., In re Safeguard Scientifics, 216 F.R.D. 577, 582-83 (E.D. Pa. 2003) ("[S]erious concerns with credibility leave Lead Plaintiff vulnerable to further attacks that would impose an unnecessary disadvantage on the class. These unique defenses against Lead Plaintiff [ ] preclude him from serving as a class representative."); Weikel v. Tower Semiconductor Ltd., 183 F.R.D. 377, 396 (D.N.J. 1998) (noting both that "[t]he fact [the named

[5] A true and correct copy of Plaintiff's deposition transcript is attached hereto as Exhibit A.

plaintiff] may not be readily available to attend trial has the potential for seriously interfering with his obligation to vigorously prosecute this action" and "[i]t would be inappropriate to subject members of the Class to potential trial delays created by a class representative"); Wagner v. Lehman Bros. Kuhn Loeb, Inc., 646 F. Supp. 643, 660-61 (N.D. Ill. 1986) ("A court need not resolve the issue of credibility against the putative class representative in order to bar class certification. It is enough to note the existence of a credibility problem and its potential adverse impact on the class."); Strykers Bay Neighborhood Council Inc. v. New York, 695 F. Supp. 1531, 1537 (S.D.N.Y. 1988) (deeming named plaintiffs inadequate representatives because they failed to respond to discovery requests); Kline v. Wolf, 702 F.2d 400, 403 (2d Cir. 1983) (concluding that the district court is not required to resolve the issue of credibility or to find that the plaintiffs testified falsely, but rather that simply making a "preliminary determination that [the lead plaintiffs'] credibility was vulnerable to attack" is sufficient).

Furthermore, it is settled that "[t]o be an adequate representative, the named plaintiff must demonstrate a willingness and ability to play an active role in and control the litigation and to protect the absent class members." J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 225 F.R.D. 208, 216 (S.D. Ohio 2003). In his deposition, Plaintiff admitted under oath that, in the past, if other people were willing to sign certain documents, he believed that he "didn't have to pay attention to them in particular . . . and so [he] signed." (Villanueva Tr. p. 41.) An admitted willingness to sign documents that he has not even read strikes at the heart of Plaintiff's ability to protect the interests of the putative class and again differentiates him from other current and former TruGreen employees who take a more reasonable and considered approach to their contractual and other obligations.

TruGreen has had the good fortune of employing law-abiding H-2B workers who come back to TruGreen year after year on a seasonal basis without any questions as to the legality of their presence in the United States. After his deposition, namely his refusal to answer any questions going to his ability to travel at some later date into the United States, TruGreen cannot say the same of Plaintiff. Thus, for this reason alone, Plaintiff has unequivocally set himself apart from other current and former TruGreen employees who are not constrained to talk about their status or related issues. Indeed, given that Plaintiff left in the middle of the 2004 season and cannot explain his employment in the United States in 200 (if any), it seems obvious that he is not an appropriate lead Plaintiff here, where Plaintiff has made the focus of his Complaint the terms and conditions of employment he received from TruGreen in 2004. For all of these reasons, this Court should not grant Plaintiff's Motion to Conditionally Certify a FLSA Collective Action, as he has no basis to lead this case on behalf of others purportedly similarly situated to him.

B. Plaintiff's Testimony Regarding His Own Expenses and Payments from TruGreen Highlight Why He and the other H-2B Workers Are Not "Similarly Situated" So As To Justify Collective Action Treatment.

In a collective action under the FLSA, it is, at all times, the plaintiff's obligation to come forward with evidence of a "reasonable basis" for the claim of class-wide relief. See generally Grayson v. K-Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996). Even at the early stage of conditional certification at which this matter rests, the Court must satisfy itself that there are other employees of the defendant who not only desire to opt-in,[6] but also are "similarly situated" to the plaintiff. Felix De Ascencio v. Tyson Foods, 130 F. Supp.2d 660, 663 (E.D.Pa. 2001).

[6] Tellingly, more than seven months have passed since Plaintiff filed his Complaint, but he has not presented one declaration other than his own to substantiate that he is similarly situated to other H-2B workers let alone that any other current or former TruGreen H-2B worker desires to opt-in to this matter.

Plaintiff still must provide "substantial allegations that the putative class members were together the victims of a ***single*** decision, policy or plan." See generally Grayson, 79 F.3d at 1097-99 (emphasis added). Further to that point, Plaintiff must do more than rest on his own speculation; rather, he must demonstrate an actual "factual nexus between [his] situation and the situation of other current and former [employees] sufficient to determine that they are 'similarly situated.'" Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 262 (S.D.N.Y. 1997); see also De La Cruz v. El Paso County Water Improvement Dist. No. 1, No,. EP-05-CV-206-FM, 2005 WL 2291015, *2 (W.D.Tex. Sept. 19, 2005) (refusing to certify a class for alleged failure to pay overtime because the court had before it "only unsupported assertions of violations that are not sufficient to meet Plaintiff's burden. No affidavits that would provide evidence that others are similarly situated was submitted by Plaintiffs."); D'Anna v. M/A-COM, Inc., 903 F. Supp. 889, 894 (D. Md. 1995) (denying motion to send notice because plaintiff's allegations were "broad and vague" and lacked "factual support" for the existence of a potential class). Here, Plaintiff's deposition testimony confirms that there is not and cannot be any "factual nexus" between the matters at the heart of his FLSA claim – his expenses and reimbursements while employed at the Wilmington, Delaware location – and the expenses and reimbursement of TruGreen's current and former H-2B workers at other locations across the country.[7]

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[7] To the extent Plaintiff is suggesting that Defendant's use of the fluctuating workweek method of overtime compensation constitutes a violation of the FLSA for which collective treatment is appropriate, that claim fails, too, as a matter of law. By definition, in order to establish a claim with respect to the fluctuating workweek, each putative plaintiff must demonstrate that (1) he has hours of work that do not fluctuate from week to week; (2) he did not receive a fixed salary as straight time pay for whatever hours he worked; and (3) he did not have a clear mutual understanding that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek rather than for working 40 hours or some other fixed amount. 29 C.F.R. § 778.114(a). Thus, by definition, the claims of any TruGreen employee with respect to use of the fluctuating workweek method is marked by factual distinctions, including, but not limited to, whether the individual employee agreed to

Most notably, Plaintiff broadly asserts in his Complaint that TruGreen did not account for the expenses incurred by H-2B employees, including him. In his deposition, however, (and consistent with the Declaration of Michael Matejik, attached as Exhibit B to Docket No. 18), Plaintiff admitted that he was given $150 in cash upon his arrival in Delaware to use for whatever reason he deemed appropriate. (Villanueva Tr. pp. 44-45.) This payment occurred prior to him engaging in any work, and he never had to repay TruGreen for these funds. (Villanueva Tr. pp. 44-45.) Although Plaintiff chose not to do so, there was nothing preventing him from applying those amounts to the expenses he allegedly incurred in obtaining his H-2B visa. (Villanueva Tr. p. 45.) Similarly, Plaintiff admitted in his deposition (and contrary to the allegations in his Complaint) that TruGreen purchased the airline ticket that enabled him to return home to Mexico even though Plaintiff chose to end his employment with TruGreen just midway through the season.[8] (Villanueva Tr. p. 17.)

Thus, completely contrary to the allegations of the Complaint, Plaintiff received an unconditional amount of money at the commencement of his employment to pay for whatever Plaintiff deemed necessary and appropriate and another unconditional payment for his return expenses at the end of his employment. Where the named plaintiff does not even have a "factual nexus" to the allegations in the Complaint, he clearly cannot satisfy his burden of offering to the Court any such nexus between him and the allegedly similarly situated potential plaintiffs. Indeed, as Plaintiff's own testimony reveals, there apparently is no single policy or practice as to which H-2B workers receive unconditional payments upon their arrival, return transportation

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the fluctuating workweek compensation plan. As set forth in Section II.C, Plaintiff admittedly knowingly accepted a compensation structure that was premised on the fluctuating workweek method of compensation.

[8] Plaintiff claims that he paid $75 cash to cover "the remainder of what the [airline] ticket cost after the cost of the bus." (Villanueva Tr. pp. 17-18.) He does not, however, dispute that TruGreen paid for his return airline ticket.

expenses, or perhaps even additional payments to cover expenses during the season. Plaintiff readily admitted that he does not even know whether any workers at the Wilmington branch asked the Branch Manager for money (unconditionally or otherwise) or even how other TruGreen branches pay their H-2B workers. (Villanueva Tr. p. 45.) Indeed, TruGreen does not have a policy or practice that either prohibits or requires Branch Managers to provide additional payments to H-2B workers, but rather leaves it to the discretion of each Branch Manager. (Declaration of James Vacchiano, dated May 12, 2006, at ¶ 4, a copy of which is attached as Exhibit A to Docket No. 18.) As such, the only way to determine which H-2B workers received payment for their expenses – whether in or whole or in part, if at all – is to ask each individual H-2B worker – an inquiry that is directly contrary to the purpose and nature of a collective action.[9] See, e.g., Lawrence v. Philadelphia, No. 03-CV-4009, 2004 WL 945139, at *2 (E.D. Pa. Apr. 29, 2004) (rejecting request for certification because "the questions of fact will likely differ for each Plaintiff and will be unduly burdensome to both Defendant and to the Court in managing as a collective action"); Morisky v. Public Serv. Elec. & Gas Co., 111 F. Supp.2d 493, 497-98 (D.N.J. 2000) (denying FLSA collective action certification where a "highly fact-specific analysis of each employee's job [duties and] responsibilities" would be required); Bayles v. American Med. Response of Colo., Inc., 950 F. Supp. 1053, 1065 (D. Colo. 1996) ("It is

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[9] Similarly, in the Complaint, Plaintiff asserts that he is similarly situated to other current and former TruGreen H-2B workers because each incurred the following expenses in connection with their employment with TruGreen: the cost of obtaining a Mexican passport, visa application and issuance fees, a border crossing fee, a third-party administrative fee paid for processing the visa paperwork, and transportation expenses to the place of employment in the United States. See Complaint ¶ 19. At his deposition, however, Plaintiff acknowledged incurring only the "the amount for the office in Guanajuato, . . .and then the cost for the visa . .. and then the cost for transportation from my home to Delaware" in connection with his employment with TruGreen. (Villanueva Tr. p. 29-30.) Thus, by Plaintiff's own admission, *he* did not incur all of the expenses alleged in the Complaint, and, therefore, cannot be similarly situated to other H-2B employees who either incurred only some or, perhaps, none of the expenses put at issue in the Complaint.

oxymoronic to use [a collective action] device in a case where proof regarding each individual plaintiff is required to show liability"); Wertheim v. Ariz, No. Civ. 92-0453 PHX RCB, 1992 WL 566321, at *4 (D. Ariz. Aug. 4, 1992)

In addition, Plaintiff admitted at his deposition to traveling freely to and from the United States using his passport, including frequent trips within the past six months to visit an uncle in California and other friends. (Pl. Tr. 9-12.) However, in the Complaint, Plaintiff asserts that TruGreen should have paid for the cost of his passport because it was "primarily for the benefit of the employer." (Complaint ¶ 22.) By Plaintiff's own testimony, it strains credulity that his passport was "primarily for the benefit of the employer" when Plaintiff was using his passport two years removed from his employment with TruGreen to travel to and from the United States as a tourist, simply visiting family and friends. It remains unclear what benefit, let alone primary benefit, TruGreen derives from that.

In short, putting aside that there is no legal requirement for TruGreen to pay or otherwise account for the expenses incurred by H-2B workers, Plaintiff's deposition testimony makes clear that the proof of whether such expenses were, in fact, incurred and/or paid by TruGreen is entirely specific to the individual. Accordingly, those admissions under oath put this matter squarely within the reasoning of the district court in Moeck, in which the court denied plaintiffs' motion for conditional certification in an FLSA action based on an overtime policy that allegedly varied among branches and even within branches. Id. at *5. That court reasoned, in words particularly applicable here, "[b]ecause of the many potential distinctions of each putative class member's claim, the Court finds that this case is not an appropriate one for class action certification, even at this early stage in the action." Like the court in Moeck, this Court should deny Plaintiff's motion for notice and collective treatment in its entirety.

C. Plaintiff's Fraud, Breach of Contract, and Breach of Covenant of Good Faith and Fair Dealing Claims Are Unsuitable for Class Treatment.

Just as Plaintiff's motion to conditionally certify a collective action should be denied in light of the undisputable facts revealed at Plaintiff's deposition, so too should any future effort to certify the same class as to the contract-based claims alleged in Plaintiff's Complaint. The crux of those claims is that the expenses and compensation structure identified to Plaintiff in Mexico before he accepted employment with TruGreen were not actually the expenses incurred by and compensation eventually paid to him once he was employed by TruGreen. However, Plaintiff's claims are entirely inconsistent with and disconnected from the facts, which clearly demonstrate that there is no legitimate basis for his claims and, therefore, no basis for his attempt to represent others as to their potential claims.

First, as to the expenses, Plaintiff knowingly agreed, before traveling to the United States, to pay $405 for his rent, utilities, and transportation during his employment in the United States. (Villanueva Exhibit 2 (authenticated at p. 34) noting $373 for rent and utilities per month and $32 for transportation charges per month.) As Plaintiff testified, he was aware of those proposed charges, but he believed that TruGreen offered the highest compensation relative to all other employers, and the expenses were worth the exchange. (Villanueva Tr. 23-24, 43-44.) However, Plaintiff ultimately paid only $240 per month for those expenses. (Compare Pl. Ex. 2 with Villanueva Tr. pp. 34-35.) Thus, the only "breach" that occurred between the expenses identified to Plaintiff in Mexico and the expenses that he actually incurred actually benefited Plaintiff by at least $165, and he therefore suffered no harm for which he can seek damages.

Similarly, Plaintiff's breach of contract claim with respect to his compensation structure is undermined by his acknowledgment that he knowingly accepted and agreed to take an offer from his Branch Manager to go from a straight hourly wage for a 40-hour workweek with a

standard overtime premium (as set forth in Exhibit 2, which was offered to him in Mexico) to a commission- and bonus-based compensation plan that afforded Plaintiff the opportunity to make more money. (Villanueva Tr. p. 37, 48-49, 51, 55-56.) Plaintiff was not obligated to accept that structure or even remain with that structure. In fact, he asked his Branch Manager about returning to a forty-hour workweek and was informed that he was free to do so but that, in an effort to manage expenses, the Branch Manager likely would not permit him to work any hours over forty. Accordingly, because the opportunity to earn more money was better staying with the commission- and bonus-based compensation Plan, Plaintiff ***knowingly chose*** to remain on that plan. (Villanueva Tr. pp. 57-58.)

Several other facts to which Plaintiff admitted at his deposition further underscore his inadequacy as a class representative, if only because the differentiating factors between Plaintiff and other potential plaintiffs render their contract-based claims too dissimilar for class treatment. For example, Plaintiff never worked for TruGreen, nor had he ever worked in the United States prior to joining TruGreen. (Pl. Tr. 17.) By contrast, many employees return to employment with TruGreen and, therefore, not only are aware of TruGreen's compensation structure but may be paid on different compensation structures, depending on the manager, the branch, and the position each H-2B worker holds. Further, Plaintiff willingly left TruGreen mid-season for a number of individualized reasons –a minor injury to his back, his disappointment with the wages he was receiving, and his sense that eventually some workers were going to have to return to Mexico. (Villanueva Tr. 60-61.) By contrast, other H-2B workers remained in TruGreen's employ for an entire season, which often extends through November.

In short, based on his admissions that he knowingly agreed to the terms and conditions of his compensation and that he suffered no damages with respect to the expenses paid by him,

Plaintiff must concede that he does not have any legal or factual basis to move forward with any of the contract-based claims set forth in the Complaint. Taken together with the additional significant differentiating facts that explain the different compensation and contractual agreements as between TruGreen and its H-2B workers, as well as the different compensation and contractual agreements as between Plaintiff and other H-2B workers, Plaintiff should not be permitted to proceed with his highly individualized claim on a class-wide basis..

III. CONCLUSION

Plaintiff's deposition testimony makes clear that the unsubstantiated assertions in the Complaint that he is "similarly situated" to TruGreen's current and former H-2B workers is simply not the case. To the contrary, Plaintiff's deposition testimony reveals in numerous ways why this matter is not appropriate for collective or class action treatment – because these are, at best, highly individualized claims that should not become an administrative burden to the Court or TruGreen as a class or collective action.

To the extent Plaintiff attempts to divert attention from the facts to argue that all that is at issue is whether TruGreen is required, by law, to compensate for certain deductions, that response only highlights what TruGreen has suspected about this matter from the beginning – that Plaintiff and his counsel are improperly using the courts to effect legislative change because there undeniably is no such legal obligation for H-2B workers under any existing laws, rules, or regulations. For all of these reasons, as well as the reasons set forth in TruGreen's initial opposition memorandum, TruGreen respectfully requests that Plaintiff's Motion for Conditional Certification be denied and all other appropriate relief.

Respectfully submitted,

/s/ Michael P. Kelly

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Dated: November 3, 2006

Attorneys for Defendants

EXHIBIT A

PART I OF II

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

RAMON VILLANUEVA, Individually and all others similarly situated, Plaintiff	:	CIVIL ACTION
vs.	:	ORIGINAL
TRUGREEN LIMITED PARTNERS AND TRUGREEN, INC. d/b/a TRUGREEN CHEMLAWN, Defendants	:	NO. 06-185

October 5, 2006

Videotaped Oral Deposition of RAMON VILLANUEVA, held in the law offices of Morgan Lewis, LLP, 1701 Market Street, 12th Floor, Philadelphia, Pennsylvania 19103, beginning at approximately 9:29 AM, before Ann V. Kaufmann, a Registered Professional Reporter, Certified Realtime Reporter, Approved Reporter of the U.S. District Court, and a Notary Public of the Commonwealth of Pennsylvania.

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Jason Hoffman, Videographer

DEPOSITION SUPPORT INDEX

DIRECTION TO WITNESS NOT TO ANSWER

Page 32 Line 12

REQUEST FOR PRODUCTION OF INFORMATION

Page 53 Line 19

STIPULATIONS

(NONE)

THE VIDEOGRAPHER: Good morning. We're now on the record. My name is Jason Hoffman. I'm a videographer employed by Esquire Deposition Services, 1600 JFK Boulevard, Suite 1210, Philadelphia, Pennsylvania, 19103.

This is a video deposition for the United States District Court, District of Delaware. Today's date is October 5, 2006. The time is 9:29 a.m.

This deposition is being held at Morgan, Lewis in Philadelphia, Pennsylvania in the matter of Ramon Villanueva versus TruGreen Limited Partners and TruGreen, Inc.

The deponent is Ramon Villanueva.

Present today counsel please introduce yourselves for the record.

MR. TUDDENHAM: Edward Tuddenham for the plaintiff.

MS. RAPPOSELLI: Vivian Rappposelli for the plaintiff.

MR. GONZALES: Peter Gonzales for the plaintiff.

MS. BOUCHARD: Sarah Bouchard for TruGreen.

MR. MATEJIK: Michael Matejik for TruGreen.

THE VIDEOGRAPHER: And the court reporter will now swear in the witness.

MR. TUDDENHAM: Just so it's on the record, Mr. Matejik is here as a corporate rep, not as an attorney, I assume?

MS. BOUCHARD: That's correct.

THE INTERPRETER: Andrea Regal, the interpreter.

THE COURT REPORTER: Would you raise your right hand.

MS. HENKE: Beth Henke for defendants.

THE VIDEOGRAPHER: The court reporter will swear in the witness.

...ANDREA REGAL, Spanish Interpreter, 430 Clements Bridge Road, Barrington, NJ 08007, having been duly sworn to translate the testimony, was examined and testified as follows:

...RAMON VILLANUEVA, Mesquite 318, Fraccion California, Cueramaro, Guanajuato, Mexico 36960 having been duly sworn was examined and testified as follows:

EXAMINATION

BY MS. BOUCHARD:

Q. Good morning, Mr. Villanueva. My name is Sarah Bouchard and I'm here to take your testimony today in the case that you've brought against TruGreen.

A. Good morning.

Q. I'm going to set forth a couple of ground rules for the deposition today so that this can run smoothly. I need you to ask any questions that you don't understand; otherwise, I'm going assume that you

have understood the question as I've posed it to you.

I need you to verbalize all of your responses, which means yes or no or words to verbalize your responses rather than gestures.

A. I understand.

Q. In you need a break, just let me know, we can take one as long as the question is not pending.

A. That's fine.

Q. Okay. Your attorneys may object to a question. They are objecting for the record. And once they are finished objecting, you should answer unless they specifically instruct you not to.

A. That's fine.

Q. Finally, you are under oath and this is no different than if you were in a court reporter of law.

A. I understand.

Q. Are you on any medications today?

A. No.

THE INTERPRETER: Excuse me.

BY MS. BOUCHARD:

Q. Without telling me what you talked about with your attorneys, what did you do to prepare for today's deposition?

A. Well, I don't know because the only thing we did was speak, so I don't know how to answer you.

Q. Did you review any documents?

A. Yes.

Q. Which ones?

A. I saw several documents, some of which I had seen before, they're mine, but I wouldn't know which ones to tell you because, pardon me, I don't know what they are called.

THE INTERPRETER: Excuse me.

BY MS. BOUCHARD:

Q. If you remember reviewing them recently, when I show them to you, just let me know, throughout the

deposition.

A. Okay, that's fine.

Q. Have you ever been involved in a lawsuit before?

A. No.

Q. What's your current immigration status?

A. I'm tourist.

Q. How long does that entitle you to be in the United States?

A. My permit expires on I think the 6th of this month.

Q. When did it begin?

A. I don't remember the day, but it was in April. I don't remember the day.

Q. So you have been on a tourist visa for six months?

A. No. The thing is I've returned to Mexico. The first time I got my permit was in April, but then I went back to Mexico and came back again, so....

Q. When you had your tourist

visa in April, when did you return back to Mexico?

A. I think I went back in May. I don't remember the date.

Q. Do you have passport stamps that would show when you were here this year?

A. Well, my passport doesn't have any stamps because I think they just give me the form, and I believe it's an E-94 (sic) form.

Q. Do you have a copy of the E-94 form?

A. Well, I have the E-94 that allows me to be here. I don't have copies of it.

Q. Do you have it in your possession today?

A. No, it's in my suitcase.

Q. Did you get an E-94 when you were here in April?

A. Yes.

Q. And did you retain a copy of the E-94 from your April visit?

A. It's the same one I have now.
Q. And that's the one that's in your suitcase?
A. Yes.
Q. And would that evidence all of the times that you've been in the United States for this year?
A. No.
Q. What were you doing when you came to the United States in April?
A. What was I doing where?
Q. What was the purpose of your visit?
A. I came to visit my uncle.
Q. Where does your uncle live?
A. In San Diego.
Q. Other than the trip you took in April, were there any other visits to the United States this year besides this one?
A. Well, when I went back to Mexico in I believe it was May and then I think again in October -- pardon, I'm

sorry, August.

Q. Just to clarify, you came on a travel visa in April to May and then came in August. And then when did you leave back to Mexico?

A. Well, I'm here.

Q. You have been on the travel visa since August?

A. Yes.

Q. Who have you been visiting since August?

A. Only my uncle, and some friends, but....

Q. What's your current home address?

A. Mesquite 318, Fraccion California, Cueramaro, Guanajuato, Mexico, and the Zip code is 36960.

Q. What did you do to earn money this year?

A. Work.

Q. Where?

THE INTERPRETER: I asked the witness to please repeat it.

THE WITNESS: Oh, I'm taking the Fifth Amendment.

MS. BOUCHARD: Can we take a break?

MS. RAPPOSELLI: Sure.

MR. TUDDENHAM: Sure.

THE VIDEOGRAPHER: Off tape 9:45.

(Recess.)

THE VIDEOGRAPHER: Back on the record 9:58.

BY MS. BOUCHARD:

Q. Mr. Villanueva, you just took the Fifth Amendment with respect to my question as to where you were working in 2006. Is that because you were working in the United States this year?

MR. TUDDENHAM: Objection. He took the Fifth Amendment to that question and I don't think you are entitled to keep asking him the same question over and over again.

BY MS. BOUCHARD:

Q. How many hours did you work

this year?

MR. TUDDENHAM: Same objection. Let me consult with my client for a moment.

THE VIDEOGRAPHER: Off tape 9:59

(Mr. Tuddenham, Ms. Rapposelli, Mr. Gonzales and the witness conferred outside of the deposition room.)

THE VIDEOGRAPHER: Back on the record 10:00.

MR. TUDDENHAM: For the record, we object. He has invoked his Fifth Amendment with respect to that question, and I don't believe you are entitled to keep asking the question in different ways to try and trick him into waiving his Fifth Amendment right.

MS. BOUCHARD: My question is a different one. I asked him how many hours he worked in 2006. Some of those hours could be in a lawful place for him to work.

MR. TUDDENHAM: They could be, but he is entitled to invoke his Fifth Amendment right, and he has.

MS. BOUCHARD: Is he also invoking it for that question?

MR. TUDDENHAM: Yes. He is going to invoke it for any question like that.

MS. BOUCHARD: Well, I need him to do that because that would mean that he did not work any hours in a lawful place.

MR. TUDDENHAM: Fifth Amendment right, when he invokes it, doesn't mean anything at all. It is neither an affirmative answer or a negative answer.

THE VIDEOGRAPHER: Off tape 10:02.

(Recess.)

THE VIDEOGRAPHER: Back on the record 10:03.

BY MS. BOUCHARD:

Q. Are you taking the Fifth

Amendment with respect to how many hours you worked in 2006?

A. Yes.

Q. My question now is for last year, 2005, where did you work?

A. In Cueramaro.

Q. Is that in Mexico?

A. Yes.

Q. Did you work in the United States at any time in 2005?

A. No.

Q. For 2004 my question is this: Did you in fact go home to Mexico after leaving TruGreen?

A. Yes.

Q. Isn't it true that you went to California after leaving TruGreen?

A. No.

Q. You didn't tell Lisa McHugh that you were in Los Angeles in 2004?

A. I don't remember.

Q. When you left TruGreen, they provided you with an airline ticket; correct?

A. Yes.
Q. And they paid for your return flight home to Mexico?
A. A part of it.
Q. What do you mean by "a part of it"?
A. I paid the remainder of what the ticket cost after the cost of the bus.
Q. Isn't it true that TruGreen provided you with an airline ticket for your trip home to Mexico?
A. Yes.
Q. And that ticket was provided to you?
A. Yes.
Q. Did you in fact return to Mexico on that ticket?
A. Yes.
Q. And was that because you no longer wanted to work at TruGreen anymore?
A. Yes.
Q. If TruGreen paid for the

airline ticket, what transportation costs did you incur on the way home?

MR. TUDDENHAM: Objection; form.

You can answer.

A. Part of the plane ticket.

Q. Are you saying that came out of your paycheck in some way?

A. No.

Q. Then how did you pay for part of the plane ticket?

A. In cash.

Q. Who did you provide that cash to?

A. To Mike.

Q. The person that's sitting next to me?

A. Yes.

Q. How much cash did you provide to him?

A. I think it was somewhere around $75.

Q. You left midway through the season in 2004; correct?

A. Yes.

MR. TUDDENHAM: Sarah, is it possible to make it a little warmer in here?

MS. BOUCHARD: Sure.

THE VIDEOGRAPHER: Off tape 10:09.

(Recess.)

MS. BOUCHARD: Let's go back on the record.

(The following took place off the video record:

MS. BOUCHARD: We're going back on the record and for the record, I have asked for an I-9 to show that he is lawfully in the United States right now. He has indicated that it's in his suitcase, which I understand is within walking distance, and I have requested it now, particularly given the answers that he has given with respect to the Fifth Amendment. You have said that you are not going to get it right now and I'm requesting you to do so.

MR. TUDDENHAM: I will tell you what, Sarah: As I explained to you at the beginning of this, he has to catch an airplane to Mexico. The deposition has to be end by 2:30. If you would like to spend the time between now and 2:30 having us to go walk to find the -- it's an I-94, I will be happy to do that right now.

MS. BOUCHARD: Then I would like that to happen.

MR. TUDDENHAM: Great.

(Recess.)

THE VIDEOGRAPHER: Back on the record 10:37.

BY MS. BOUCHARD:

Q. Mr. Villanueva, I'm going to ask you some background questions. What is your marital status?

A. I am married.

Q. Do you have any children?

A. Yes.

Q. How many?

A. One.

Q. Boy or girl?
A. Girl.
Q. And how old is she?
A. She just turned 4.
Q. What's your educational background?
A. Five years in university.
Q. What's the university called?
A. University of Guadalajara.
Q. Have you had any other H-2B positions prior to TruGreen?
THE INTERPRETER: Did you say H-2B?
MS. BOUCHARD: Positions.
A. No.
Q. Had you worked in the United States prior to coming to the United States for TruGreen?
A. No.
Q. What type of work did you do in Mexico prior to working for TruGreen?
A. Giving classes.

MS. BOUCHARD: To the translator, does that mean taking classes?

THE INTERPRETER: Giving classes, teaching.

BY MS. BOUCHARD:

Q. Okay. What did you teach?

A. Math and junior high school classes.

Q. How long did you teach those courses?

A. I don't remember exactly.

Q. I think I might have asked this question already, but did you did you work in the United States for any other person besides TruGreen?

MR. TUDDENHAM: You mean?

MS. BOUCHARD: In 2004.

A. No.

Q. Have you had any other H-2B positions after TruGreen?

A. No.

Q. Have you had any other work visa that legally allows you to work in

the United States after TruGreen?

MR. TUDDENHAM: Objection, calls for a legal conclusion that he is not competent to give you, but he can answer.

A. I'm taking the Fifth Amendment.

Q. How did you learn about the opportunity to work at TruGreen?

A. In the recruiting office in Mexico.

Q. What is the recruiting office's name?

A. If I'm not mistaken, it's LLS.

Q. Okay. Who did you speak to in the recruiting office?

A. I don't remember their name. I only know it was a woman.

Q. What did you learn about the position that interested you?

A. The salary.

Q. What was told to you at that time about the salary?

A. It was the highest on the list they showed me.
Q. What did the list include?
A. Well, names of other companies, but I don't remember them.
Q. Did he have any other people that he knew that were also interested in jobs with TruGreen?
Let's strike that question; okay?
MR. TUDDENHAM: Can you rephrase it saying "you." You are saying "he."
MS. BOUCHARD: Okay.
BY MS. BOUCHARD:
Q. Did you know of any other people that had also worked for TruGreen?
A. No.
Q. At the time you were learning about the position, what did you understand the position to be?
A. In regard to what?
Q. **Did you understand it to be**

a laborer position?

A. Not necessarily, but I didn't expect it to be anything different.

MR. TUDDENHAM: For the record, just -- your question "laborer" was translated "manual labor."

MS. BOUCHARD: Okay.

BY MS. BOUCHARD:

Q. What I was asking is whether you remember the title of your job to be laborer or applicator.

THE INTERPRETER: Applicator you said?

A. I don't remember.

MS. BOUCHARD: Mark this.

(Below-described document marked as Villanueva Exhibit 1.)

BY MS. BOUCHARD:

Q. Thank you for providing us with your I-94 form. I have a question about your I-94 form based on testimony you've previously given. I understand from your testimony that you entered the

country in August, most recently; is that correct?

A. That's true.

Q. My understanding is that the I-94 should reflect that somewhere on this document.

A. No.

Q. Is this the only document that you received since April?

A. Yes.

Q. And just to clarify, you came here in April?

A. Okay. The thing is this form that I have here is what they gave me when I came in April. But I had another that, if I'm not mistaken, they gave to me -- they gave me the 26th of February that allowed me to come in and go out over the border.

And so when I went back to Mexico in April -- and so when I came back to the United States through Los Angeles, this is the one they gave me because my understanding was that the

other one was to be able to go and come across the border.

Q. So were you California at the end of March of this year?

A. May I see a calendar?

Q. A calendar of the month of March?

A. Well, the thing is that I don't remember the dates exactly. And if I came up in February, then it may have been in March. The thing is I don't remember because I was coming and going.

MR. TUDDENHAM: It may have been in California in March, is what he said.

THE INTERPRETER: I'm sorry. Did I not say that, may have been?

MS. RAPPOSELLI: In California.

MR. TUDDENHAM: In California.

THE INTERPRETER:

California.
BY MS. BOUCHARD:
Q. Do you remember having a conversation with Lisa McHugh over the phone in March of this year?
A. Yes.
Q. And what did you two talk about?
A. Well, I was a bit confused because I thought it was another friend of mine by the name of Lisa. So I was actually asking about Lisa, the friend of mine.
Q. On this same phone call?
A. I think so, if I'm not mistaken.
Q. So you thought that you were talking to someone else other than Lisa McHugh but you were asking about Lisa McHugh?
A. Well, when I called the office, I asked for Lisa.
And so this woman answered and I thought it was the Lisa that I was

asking for and then -- and so then it was clarified that she was not the person that I was looking for, and so then I did start asking about the person that I was asking for.

Q. Why were you calling TruGreen's offices?

A. Because she didn't answer her cell phone.

Q. What were you intending to talk to Lisa about?

A. Well, we're friends and I just wanted to know how she was and what she was doing.

Q. Did you ask anyone at TruGreen to take documents for you?

A. No.

Q. What expenses did you incur in obtaining H-2B visa and traveling to the United States to work for TruGreen?

A. Well, I don't remember the numbers exactly, but it was the amount for the office in Guanajuato. I think that was 155 and then the cost for the

visa, which was about 200, and then the cost for transportation from my home to Delaware.

Q. Did your employer in 2006 pay for your transportation costs to and from Mexico?

MR. TUDDENHAM: Excuse me? Objection. What employer in 2006 are you talking about?

MS. BOUCHARD: He said he worked in 2006.

THE WITNESS: No.

MR. TUDDENHAM: Objection. Why don't you try clarifying your question?

BY MS. BOUCHARD:

Q. You can answer.

A. Could you please repeat the question?

Q. You have been traveling to and from Mexico from the United States in 2006; correct?

A. Yes.

Q. And you have been working

in the United States in 2006; correct?

MR. TUDDENHAM: Objection. He has taken the Fifth Amendment to that question three or four times. And I mean it, Sarah, when someone invokes the Fifth Amendment, it doesn't become a game where you get to keep trying to ask the question in a different way to trick him to say something else.

MS. BOUCHARD: Well, my question is actually --

MR. TUDDENHAM: He has taken the Fifth Amendment. You have your answer.

I'm going to direct him not to answer the question.

MS. BOUCHARD: So I just want to make clear, my question is a different one, and it's whether his employer in 2006 paid for transportation costs to and from the United States.

And I just want to make sure that that is the question that you are invoking the Fifth on.

MR. TUDDENHAM: Well, I would ask you to clarify what employer you are talking about.

No. You need to have some foundation for that. I mean --

MS. BOUCHARD: Because you are taking the Fifth on the foundational question.

MR. TUDDENHAM: Sarah, if you will clarify what you were talking about, he may be able to answer the question. But if you are going to ask a question that is so vague that it could cover anything, he is invoking his Fifth Amendment right.

MS. BOUCHARD: Well, I was trying to clarify that and then you interrupted me. So my question for the foundation was --

MR. TUDDENHAM: Well, I apologize.

MS. BOUCHARD: My question for the foundation was --

BY MS. BOUCHARD:

Q. The employer that you worked for in the United States, did that employer pay for your transportation costs in 2006?

MR. TUDDENHAM: Objection; foundation. Objection. He has invoked the Fifth Amendment to any questions involving work in the United States in 2006. You have your answer to that.

BY MS. BOUCHARD:

Q. What were your travel costs from Mexico to Delaware in 2004?

A. Well, I don't remember exactly the numbers because I paid for several, several tickets.

Q. Several bus tickets?

A. Yes.

Q. Can he approximate the cost?

I mean can you approximate the cost? My apologies.

A. I think it was somewhere around $170 and then whatever I paid for food, and that I have no idea.

(Below-described document marked as Villanueva Exhibit 2.)

BY MS. BOUCHARD:

Q. What's been marked before you as Exhibit 2 has the title "Employer Disclosure Affidavit." Do you see the box "Rent and utilities per month"? Yes?

A. Yes.

Q. And do you see it says $373?

A. Yes.

Q. Isn't it true that you were not in fact charged $373 for rent and utilities?

A. Well, not entirely. Well, and, if it was, I wouldn't know how to show you because on my check the -- it wasn't there entirely.

Q. Isn't it true that you were charged $60 per week for rent and utilities?

A. I think that was only the rent, as far as I understand.

Q. Didn't that also include utilities and transportation?

A. I suppose so because I didn't pay for them aside from that.

Q. So you paid approximately $240 per month for rent, utilities, and transportation charges?

A. What do you mean by "utilities"? What is meant by "utilities"?

Q. Electricity.

A. Oh, then that's right. Except for the phone.

Q. You had to pay for the phone charges separately?

A. Yes. My companion was in charge of that; but, yes, we did have to pay for that separately. It wasn't much.

Q. Was your local service paid for by TruGreen? Was your local phone service paid for by TruGreen?

A. I think so, yes.

Q. And I apologize if I asked

this, but is this your signature on this document?

A. Yes.

MR. TUDDENHAM: Sarah, why don't clarify what document you just referred to?

MS. BOUCHARD: I'm referring to Exhibit 2, the only one with a signature. Oh, except the other one -- I apologize.

BY MS. BOUCHARD:

Q. Who communicated the offer in Mexico about the TruGreen job?

A. The person that was in the office; I don't know who that is.

Q. Did you understand that to be an LLS employee?

A. No.

Q. Who was it then?

A. Well, we had to choose someone from the list and they were the ones that were going to give us the contract or contract us, and in this case it was TruGreen.

Q. There was no employee in Mexico from TruGreen, was there, that talked to you?

A. That's true, no.

Q. You said you did not know anyone who had worked previously for TruGreen?

A. That's true.

Q. What were you told before you accepted the offer about compensation and overtime?

A. What's "compensation"?

Q. The amount that you are paid.

A. I'm sorry. Once again, what was the question?

Q. What were you told about your pay and overtime pay before you accepted?

A. I only knew what was on this paper.

MR. TUDDENHAM: And, for the record, the witness is indicating Exhibit 2.

BY MS. BOUCHARD:

Q. Did you understand that TruGreen would provide a uniform to you at no cost to you?

A. Well, I didn't know that because I didn't even know that I was going to be using a uniform.

Q. At some point did you learn that you would be using a uniform?

A. I think when I got to Delaware.

Q. Did you ever have to pay for the uniform?

A. No.

Q. Were you told in Mexico that there may be opportunities to be promoted at TruGreen?

A. No. And what's more, the person that told me about it didn't even know what all was -- what all it entailed.

Q. The person that you spoke to did not know all the terms and conditions of the TruGreen's employment

when you spoke to that person?

A. I was referring to the job itself. She didn't know exactly what I would be doing.

Q. But you accepted the job anyway?

A. Yes.

Q. Was the only TruGreen facility that you worked for in Wilmington?

A. As far as I know, unless I have worked for another office without knowing it. But I believe so.

Q. Okay. Was Mike Matejik your supervisor?

A. Yes.

Q. Do you know Jim Vacchiano?

A. No.

Q. How many other H-2B workers were there when you were there?

A. Well, I met five, and I suppose that's all of them.

MR. TUDDENHAM: Are we giving them separate numbers or --

MS. BOUCHARD: No.

(Below-described document marked Villanueva Exhibit 3.)

BY MS. BOUCHARD:

Q. What's been marked as Exhibit 3 should be a three-page document. Does everyone have three pages?

A. Yes.

Q. On TruGreen Bates numbered 15, which I believe is the third page, did you read this before signing it?

A. I don't recognize -- I don't remember.

Q. You don't remember whether you read it or not?

A. I don't remember whether I read it or not because I don't remember or given that I don't remember.

Q. Do you normally sign documents that you have not read?

A. No.

Q. So do you think you did read this document, in retrospect?

A. I don't know what to tell you because there were so many documents that I signed.

Well, I have to recognize the fact that I didn't pay attention to them in particular. Everybody was signing and so I signed.

Q. Were there some documents in Mexico that you may not have read as well and just signed?

A. Well, in Mexico the only thing they gave me were these documents, the ones that are marked No. 1 and 2 -- no, I'm sorry, just No. 2, so that's easy to remember.

Q. So those are the only two documents that you signed in Mexico, the ones that you just previously mentioned?

A. Well, actually it was only two documents, this document and another document that I don't have here. But this was the only one I signed.

MS. BOUCHARD: This is going to be Exhibit 4.

(Below-described document marked as Villanueva Exhibit 4.)

MR. TUDDENHAM: Do you have a copy for me?

MS. BOUCHARD: Oh, I'm sorry, Ed.

BY MS. BOUCHARD:

Q. Mr. Villanueva, is this your handwriting on this document which has been marked as Exhibit 4?

A. Yes.

Q. And did you see -- first of all, did you read this document before signing it?

A. I think so. I believe so.

Q. Then did you understand in Paragraph 8 that the costs that were identified in Paragraph 7 were your responsibility?

A. Yes.

Q. But you came to -- you agreed to pay those; correct?

A. I paid them.

Q. But those are the costs

that you are disputing now in your lawsuit?

A. May I speak to my attorney?

Q. Sure.

THE VIDEOGRAPHER: Off tape 11:25.

(Recess.)

THE VIDEOGRAPHER: Back on the record 11:27

MS. BOUCHARD: Could the court reporter repeat the question that's pending on the record?

(The court reporter read the record as follows:

"QUESTION: But those are the costs that you are disputing now in your lawsuit?")

A. Yes.

Q. Why did you take the job with TruGreen even though you had to pay those expenses?

A. Well, because on the list it was the best salary. And the people

that connected me up to the office said that those were the costs that one had to pay -- yes, the costs.

Q. Did you see the TruGreen job as an opportunity to make money that you could not make in Mexico?

A. Definitely, yes, and above all much more quickly.

Q. Did you receive $150 in cash -- let me strike that question. Let me go back to this.

This document that's Bates stamped RV-2, was that presented to you in Mexico or Delaware?

MS. RAPPOSELLI: Can we reference Defendant's Exhibit 4? Is that what you're referencing?

A. Yes.

Q. When you arrived in Delaware, you received $150 cash when you got there; correct?

A. Yes.

Q. You never had to repay that money back?

EXHIBIT A

PART II OF II

A. Yes, that's true.
Q. And you could use that money how you wanted to?
A. Well, yes, even though that at that moment it had to be for food.
Q. And is that what you used it for?
A. Yes, and I believe I bought a blanket or something like that.
Q. Did you receive any other advances from Mike?
A. No.
Q. That $150 was not actually an advance, but what I'm asking you is whether you could have asked Mike for mean if you needed it sooner.
MR. TUDDENHAM: Objection, form.
A. I don't know.
Q. Did you know of any other workers that asked Mike for money sooner than it was earned?
A. No. As far as I know, no.
Q. Do you know how other

TruGreen branches pay their H-2B workers?

A. No.

Q. Do you know if TruGreen paid some of the costs of your housing?

A. No.

Q. You don't know?

A. No, I don't know.

Q. Do you know what your actual transportation costs were? In other words, do you know if TruGreen paid for some of your transportation costs?

MR. TUDDENHAM: From where to where?

BY MS. BOUCHARD:

Q. I'm just talking while working in the Delaware area.

THE INTERPRETER: I'm sorry. Your answer to from where to where?

MS. BOUCHARD: In the Delaware Valley.

A. Well, the only place we

went -- well, practically the only place we went was to the office, and for that Mike gave us passes for the bus.

Q. Do you know how much the bus pass actually cost?

A. No.

Q. Did you ever ask why you were being undercharged for transportation, rent, and utilities?

MR. TUDDENHAM: Objection, form.

THE INTERPRETER: Rent, transportation?

A. No.

Q. How did you learn that you were going to take the position as specialist at TruGreen?

MR. TUDDENHAM: Objection; form.

A. I didn't know -- I didn't know it was going to be that position.

Q. Did you have a conversation with Mike about the specialist position and the benefits that could come from

you working as a specialist?
A. Well, I don't quite understand because I didn't speak to Mike until I got here. And when I got here, I was just supposed to do what I was supposed to do.
Q. Do you recall a conversation with Mike, with other H-2B workers present, where he described the specialist position and the opportunity to earn more money in that position?
A. Well, I remember him telling us about what the job would be, but I don't remember anything about another position, any other position.
Q. Do you recall him comparing the specialist position to the laborer position?
A. No, I don't think so. I don't remember.
Q. Do you recall him talking to you about bonuses that you could earn as a specialist?
A. I remember him speaking to

us about commissions, but the position of specialist I really didn't even know.

Q. My question, though, is about bonuses. Do you recall getting any bonuses?

A. I think so, yes. If you're referring to the commissions that appeared on our checks, then, yes.

Q. And you recall getting commissions?

A. Sometimes.

Q. What would the commissions be based upon, if you remember?

A. On production.

Q. Is there any discussion of commissions based on production in what's marked as RV-1? And I'm not sure what that's Bates numbered. I apologize.

MR. TUDDENHAM: Sarah, before the record gets totally messed up, RV-1 is his I-94.

MS. BOUCHARD: No. RV --

MR. TUDDENHAM: Sarah, could

you use the exhibit numbers? You started with exhibit numbers this morning.

MS. BOUCHARD: What exhibit number is it for the record?

THE INTERPRETER: I have no idea because I don't have them. What exhibit number are you looking at?

A. I can tell you it's Exhibit No. 2.

BY MS. BOUCHARD:

Q. What I'm referring to, for the record, is Exhibit No. 2 and I'm asking if this document reflects any commissions that you could potentially earn.

A. Yes.

Q. And does it say how much?

A. No.

Q. Did you have any understanding of how much commission you would earn when you were in Mexico and signed this document?

A. No.

Q. But you accepted the position anyway?
A. Yes, I accepted it because of the salary.
Q. What salary are you referring to?
A. The one on this page, what it says here on this page.
Q. Okay. I see an hourly rate on that page but I don't see a guaranteed salary.
A. I think it's a question of language. In Spanish we refer to this as salary.
Q. Okay. Thank you.
A. You're welcome.
Q. Did you independently keep track of your hours other than -- yeah, did you independently keep track of your hours on a piece of paper?
A. Sometimes I did so.
Q. Do you still have those pieces of paper?
A. I wouldn't know to tell you

for sure because if I do have them, they are buried under a bunch of papers in Mexico. So I wouldn't know to tell you for sure.

Q. As part of this lawsuit, have you checked your records in Mexico to make sure that you've produced everything that's related to this lawsuit to your attorneys?

A. Well, yes, some in Mexico and some before I left here.

Q. And so you just stated, though, that you think they are underneath some other papers in Mexico.

MR. TUDDENHAM: Objection, form.

A. Well, what I was referring to is before I left for Mexico I reviewed some documents and -- and so -- and they're there, they were there. And then when I spoke to my attorneys --

THE INTERPRETER: I'm sorry. I lost it entirely.

A. Well, some documents I

reviewed here and one of them was this one. And then others I reviewed in Mexico when I was there.

MR. TUDDENHAM: I don't think the witness is understanding your questions.

BY MS. BOUCHARD:

Q. My question is this: My question is, you said you had a piece of paper or pieces of paper where you tracked the number of hours that you worked at TruGreen. Where are those pieces of paper?

A. In Mexico.

Q. And why haven't you produced those to your attorneys?

A. They haven't asked for them.

MS. BOUCHARD: Those would truly be covered by the disclosures.

MR. TUDDENHAM: I assure you, Sarah, if they can be found, you will get a copy of them.

MS. BOUCHARD: Okay. He seems to suggest that he still has them

in Mexico, by his testimony.

MR. TUDDENHAM: Well, actually what he first said was they might be in Mexico. If they exist, believe me, we would be just as interested in seeing them as you.

MS. BOUCHARD: Okay.

BY MS. BOUCHARD:

Q. What was the type of work that you did on a daily basis for TruGreen?

A. To apply chemicals on the grass -- lawns.

Q. To different homes or where would you go?

A. At different homes and different places.

Q. How would you get to those different places?

A. Well, in a pickup truck or a truck of TruGreen's. It depended on what it may be.

Q. Was there a designated worker who would drive?

A. At first, yes.
Q. Did that person have a different job description than you did?
A. I don't know.
Q. Okay. Did you enjoy the work?
A. Well, it was work and they paid me. It was work.
Q. Could you have earned more money if you had worked more hours?
A. In one day?
Q. In other words, if you had asked to work more hours, would they have allowed you to work more hours and make more money?
A. In the way that they paid me, not necessarily. In the way that I was paid, not necessarily.
Q. Why?
A. Because the more hours I worked, the less they paid me per hour.
Q. But you still would have been getting more money because you would be working more?

A. Yes, but my work would be worth less, my efforts would be worth less.

Q. Do you understand that that's a lawful way to pay people in the United States?

MR. TUDDENHAM: Objection, calls for a legal conclusion.

MS. BOUCHARD: I'm just asking if he knows. I'm not asking --

MR. TUDDENHAM: Well, he's not a lawyer. If you want to ask him his opinion as a layperson, be my guest.

MS. BOUCHARD: Yes.

A. In my opinion?

Q. Yes.

A. No.

Q. Did you complain at some point about how you were paid?

A. Yes.

Q. And who did you complain to?

A. Well, I believe I did so many times. So I don't remember the first time, but I believe it was at

least on some occasions to Mike.

Q. And who else did you complain to?

A. Well, I believe it was to my manager -- well, he wasn't my manager, but Kevin Davis.

Q. Who is Kevin Davis?

A. Well, I believe he was the manager of another group of workers.

Q. Were they H-2B workers?

A. I don't think so.

Q. When you complained to Mike about how you were paid, what did he tell you?

A. Well, he said that it was fine and he explained to me once again the way to be paid. And he said if I wished, I could be paid according to what this page says but that if I was paid the way it says here, then I wouldn't receive commissions or overtime.

MR. TUDDENHAM: And for the record, the witness is indicating

Exhibit 2.
BY MS. BOUCHARD:
Q. So did you decide, based on that conversation, to remain being paid in the same way that you started being paid?
A. Yes, for two reasons: because if I chose to work by the hour, then according to what Mike said, I could only work 40 hours. And the other reason is that he said it would be fine, that I would make more money, and it was just a question of time.
Q. Were you promised any number of overtime hours in Mexico?
A. No.
Q. You had mentioned another person who I believe it was a field manager. What did you say to him about how you were being paid?
MR. TUDDENHAM: Objection; form. For the record, are you talking about?
BY MS. BOUCHARD:

Q. You mentioned Kevin Davis?
A. (Witness shakes head.).
Q. What did you say to him with respect to your complaints about wages?
A. Well, I asked him if that was all right and whether it was allowed to do that. And he explained to me once again the pay, the way in which I was paid.
Q. Did anyone in Mexico promise you a certain amount of commissions?
A. No.
Q. Did you strain your back at some point while working for TruGreen?
A. Yes.
Q. And you were paid for that -- oh, let me stop.
You missed a day of work for that?
A. Yes.
Q. And you were paid for that day even though you didn't work;

correct?

A. I don't remember, but it's probable that, yeah.

But I just want to clarify something: That the problem was actually not the day of work but that as a result I could not meet my quota of production.

Q. Did your injury preclude you from working hours that you wanted to?

A. I'm just referring to that day.

Q. Oh, that day. So you weren't able to make commissions on that day but you were paid for that day?

A. And, well, as I said before, I suppose so, but I don't remember exactly.

Q. Why did you decide to leave TruGreen?

A. I believe I had many reasons to do so, but the main reason was that I was not receiving what I was

told I would receive, what's on this paper.

Q. Which is Exhibit 2?

A. Yes.

Q. Isn't it true that you just stated that Mike said that you could go to this system of compensation if you wanted?

MR. TUDDENHAM: Objection; form.

A. It's true that he told me that, but at that point in time he told me that I would be better off staying with commissions because I could earn more money.

Q. And you chose to stay on the commission plan?

A. Yes.

Q. What other reasons did you decide -- what were the other reasons you decided to leave TruGreen mid-season?

A. My back was not all right, and because I received what you might

call a proposition from Mike that he had to return some of of us to Mexico. Basically that's it.

Q. So you chose to volunteer?

A. Well, if one could call it volunteer, based on all of the bad things involved, yes.

Q. Did other H-2B workers decide to stay?

A. I don't think he offered anyone else to leave.

Q. That wasn't my question, though. My question was, were you the only H-2B worker that left?

A. As far as I know, yes. Well, I at least returned alone.

MS. BOUCHARD: Do you want to stop so we can do the video?

THE VIDEOGRAPHER: This concludes videotape No. 1 at 12:03.

(Recess.)

THE VIDEOGRAPHER: We're back on the record. This is the beginning of Tape 2. The time is

12:14.
BY MS. BOUCHARD:
Q. When you returned to Mexico in 2004, did you immediately begin working?
A. No.
Q. When did you start working in 2004, if at all?
A. If I'm not mistaken, I don't think it was until September.
Q. And what did you do?
A. Give classes.
Q. And what was your hourly wage giving classes?
A. You're going to laugh.
Q. If you could estimate it in American dollars, that would be great.
A. Something like $2.
Q. $2 an hour?
A. (Witness shakes head.)
Q. And about how many hours per week did you work?
A. Somewhere around 50.
Q. On what's marked as

Exhibit 2 it states "Skills" and it says "valid driver's license, bilingual." Did you have a valid driver's license?

A. Yes.

Q. And are you bilingual?

A. Well, I wouldn't know how to -- I don't believe that I have the ability to evaluate that.

Q. But you presented yourself as bilingual to TruGreen?

A. Well, in reality it wasn't me who made that decision. It was the person with whom I spoke in Guanajuato. She was asking me some questions in English and that's what she decided, that I was bilingual.

MS. BOUCHARD: Okay. Thank you. I don't have any further questions.

MR. TUDDENHAM: We will reserve ours to the time of trial.

THE VIDEOGRAPHER: That concludes today's videotape deposition. The time is 12:19.

(Witness excused.)

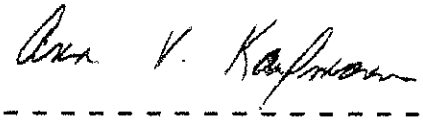
(Whereupon the examination adjourned at 12:19 p.m.)

- - - - - -

C E R T I F I C A T E

I hereby certify that the witness was duly sworn by me and that the deposition is a true record of the testimony given by the witness

It was requested before completion of the deposition that the witness RAMON VILLANUEVA, have the opportunity to read and sign the deposition transcript.



Ann V. Kaufmann, RPR, CRR

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means, unless under the direct control and/or

supervision of the certifying reporter.)

INSTRUCTION TO THE WITNESS

Please read your deposition over carefully and make any necessary corrections. You should state the reason in the appropriate space on the errata sheets for any corrections that are made.

After doing so, please sign the errata sheet and date it.

You are signing same subject to the changes you have noted on the errata sheet, which will be attached to your deposition.

It is imperative that you return the original errata sheet to the deposing attorney within thirty (30) days of receipt of the deposition transcript by you. If you fail to do so, the deposition transcript may be deemed to be accurate and may be used in court.

E R R A T A

PAGE	LINE	CHANGE

ACKNOWLEDGEMENT OF DEPONENT

I, _____, do hereby certify that I have read the foregoing pages, _____and that the same is a correct transcription of the answers given by me to the questions therein propounded, except for the corrections or changes in form or substance, if any, noted in the attached errata sheet.

_____
DATE

Subscribed and sworn to me this _____ day of _____, 2005.

My Commission expires:

_____
Notary Public

Número de salida

07478274012

Servicio de Inmigración
y Naturalización
I-94
Registro de Salida

DEPARTMENT OF HOMELAND SECURITY • U.S. CUSTOMS AND BORDER PROTECTION
ADMITTED
1 A Y
APR 09 2006
Class 3-2
Until OCT 07 2006
27 1169

14. Apellido
VILLANUEVA

15. Nombre
RAMON

16. Fecha de nacimiento (día/mes/año)
21 10 2178

17. Ciudadanía
MEXICAN

Vea al reverso

STAPLE HERE

Aviso: Si una persona no inmigrante acepta empleo sin autorización está sujeta a deportación.
Importante: Guarde este permiso en su poder; ***lo debe presentar al salir de los E.U.A.*** El no hacerlo podrá demorar su entrada en el futuro a los E.U.A.
Usted está autorizado a permanecer en los E.U.A. solamente hasta la fecha indicada en este formulario. Si permanece en los E.U.A. sin permiso de las autoridades de inmigración después de esta fecha estará violando las leyes.
Presente este permiso al salir de los Estados Unidos a:
- la línea de transporte marítimo o aéreo;
- un oficial canadiense, al cruzar la frontera con el Canadá;
- un oficial estadounidense, al cruzar la frontera con Méjico.

Los estudiantes que planean volver a entrar a los E.U.A. dentro de los 30 días siguientes a la fecha de salida para regresar a la misma institución educativa, deben ver la sección de "Entrada-Salida" en la página 2 del formulario I-20, **antes de entregar este permiso.**

Record of Changes

Port: **Departure Record**

Date:

Carrier:

Flight#/Ship Name:

I-94 SPANISH

VILLANUEVA
EXHIBIT NO. 1
AMC 10/5/06

Employer Disclosure Affidavit

for Company: Tru-Green Chemlawn (Newport)
Order Dated: 9/29/2003 9:52:52 AM

view premium rates
view Spanish form
close this window

Name of Sponsoring H-2B company	Tru-Green Chemlawn (Newport)
Address:	1350 1st State Blvd , Newport, DE 19804
Office Phone:	302-992-9680
Fax Phone:	302-633-9428
Mobile Phone:	302-420-8335
Home or Other Phone:	302-376-8186
Contact Name:	Mike A Matejik
Contact Title:	Branch Manager

Work Information

Occupation Title: Pesticide Handlers, Sprayers, and Applicators, Vegetation

Occupation Description:
Apply pesticides, herbicides, fungicides, or insecticides to lawns using sprayers, seeders, spreaders, aerators

Employment Start Date: 3/16/2004 **End Date:** 11/15/2004

List the tasks and skills needed to perform the work.

Education: none

Experience: lawn fertilization very helpful

Skills: valid driver's license; bilingual

Starting wage offered (if different from prevailing wage):	$11 34 O.T. Rate: $17 01
Average hours of work per week:	40
Rent and utilities per month:	373
Transportation charge per month (if applicable):	32
Other charges to worker per month (if any):	
Comments/Instructions for worker:	Workers will receive commission based on production level
Day and place paycheck is distributed:	Friday

Will the employer guarantee to supply training if the employee does not have the required skills? YES

U. Villanueva
EXHIBIT NO. 2
AMC 10/5/06

Signature of Employee: Ramon Villanueva Date: 02/20/04

TRUGREEN
ACUERDO DE CONFIDENCIALIDAD DEL EMPLEADO

TruGreen Limited Partnership (de aquí en adelante, "TruGreen") ha invertido considerable tiempo, dinero, y esfuerzos en el desarrollo de sus productos, equipos, programa de comercialización y otros sistemas y materiales de negocios, y en el reclutamiento y entrenamiento de sus empleados. TruGreen es propietaria y tienen un interés de propiedad valiosa en sus diversos productos, servicios, procedimientos, y sistemas (Información Confidencial de Negocios). Como empleado de TruGreen, usted tendrá acceso a la Información Confidencial de Negocios, incluyendo la información relativa a la investigación, productos, entrenamiento, administración, comercialización, y ventas.

Es importante que cada empleado reconozca y acepte que la Información Confidencial de Negocios, según exista de tiempo en tiempo, es un patrimonio valioso, especial, y único de TruGreen, y que TruGreen sufriría graves perdidas si dicha información fuese divulgada o apropiada indebidamente. El propósito de este documento es explicar ciertas obligaciones y responsabilidades legáis aplicables a cada empleado con respecto a la Información Confidencial de Negocios de TruGreen, y obtener os acuerdo de cumplir estas obligaciones y responsabilidades.

Pan proteger a TruGreen y a su información de propiedad exclusiva, me comprometo a lo siguiente:

A. Me comprometo a, durante y después de mi empleo en TruGreen, no divulgar, copiar, usar, retirar, ni usar en mi beneficio propio o en beneficio de otros la Información Confidencial de Negocios de TruGreen (incluyendo, de forma no exhaustiva, su administración, manuales de comercialización y ventas, materiales de entrenamiento, listas de clientes, legajos de clientes, tarjetas de ventas, y tarjetas de servicio) que yo tenga o haya obtenido por medio de mi empleo en TruGreen.
B. No solicitaré ni alentaré, directa o indirectamente, a ningún empleado de TruGreen a alejarse o terminar su empleo en TruGreen.
C. Autorizo a TruGreen, durante mi empleo y durante un periodo posterior razonable, a usar cualquier nombre o fotografía en los materiales impresos u otras comunicaciones distribuidas por TruGreen con fines publicitarios y promocionales.
D. Notificaré a TruGreen rápidamente de todas las invenciones, mejoras, descubrimientos, y métodos que tengan relación con, o sean de utilidad para cualquier negocio de TruGreen, ahora o en el futuro, que yo haga o descubra mientras sea empleado de TruGreen. Cederé a TruGreen todos los derechos, títulos, e intereses en dichas invenciones, mejoras, descubrimientos, y métodos, y cualesquiera patentes o solicitudes de patentes relacionadas que tengan que ver con negocios que TruGreen esté realizando, o pueda razonablemente esperarse que realice, o que haya expresado previamente su intención de realizar.

En caso de una violación o amenaza de violación por mi parte de cualquier provisión de este acuerdo, los daños que TruGreen podría sufrir pueden ser difíciles o imposibles de evaluar, por lo cual TruGreen tendrá derecho a un mandamiento judicial que me impida usar o divulgar la información Confidencial de Negocios de TruGreen. Nada de lo aquí contenido se interpretará como una prohibición a TruGreen de buscar otros remedios que tenga disponibles para dicha violación o amenaza de violación, incluyendo, en forma no exhaustiva, el recobro de daños de mí por una cantidad igual a los ingresos ganados por medio o gracias a la violación.

Entiendo que este Acuerdo solo podrá ser modificado por escrito, y ello sólo por el Presidente de TruGreen, y que ningún otro gerente o representante tiene ninguna autoridad para establecer ningún acuerdo de empleo por un período especificado, ni de hacer ningún acuerdo contrario al que antecede. Entiendo además, y acepto, que la consideración para firmar este Acuerdo es mi empleó y/o continuación de empleo en TruGreen, y que mi empleó puede terminarse, con o sin causa y con o sin aviso, en cualquier momento, tanto por TruGreen como por mi.
Entiendo también y acepto que pagaré los honorarios razonables de abogados y los costos judiciales incurridos por TruGreen como consecuencia de cualquier demanda judicial iniciada por TruGreen para hacer valer los términos de este Acuerdo. La validez o la posibilidad de hacer cumplir una provisión dada no afectará la validez o la posibilidad de hacer cumplir ninguna otra provisión de este Acuerdo.

[redacted]: 03/10/04

[redacted]O: [signature]

[redacted] RAMON VILLANUEVA BAZALDUA

TruGreen Limited Partnership
Por: TruGreen, Inc. (su Socio General)

Fecha: 3/19/04

Por: Yolanda Mireles

Nombre y cargo en imprenta: Yolanda Mireles JBEC

TII SPAN.3/2001

Villanueva
EXHIBIT NO. 3
AM 10/5/06

TU SPAN. 5/99

TRU0013

414341029D

Form **8850** (Rev. October 2002) Department of the Treasury Internal Revenue Service

Pre-Screening Notice and Certification Request for the Work Opportunity and Welfare-to-Work Credits

OMB No. 1545-1500

5079082100 4H/cv

Job Applicant: Fill in the lines below and check any boxes that apply. Complete and sign the form.

Your Name: RAMON VILLANUEVA BAZALDUA Social Security Number: 222-98-0252

Street address where you live: 213 BELMONT AVE.

City or town, state and ZIP code: 19804

Telephone No. ( )

If you are under age 25, enter your date of birth (month, day, year) [redacted]

Work Opportunity Credit

1 ☐ Check here if you received a conditional certification from the state employment security agency (SESA) or a participating local agency for the work opportunity credit.

2 ☐ Check here if **any** of the following statements apply to you.

- I am a member of a family that has received assistance from Aid to Families with Dependent Children (AFDC) or a successor program for any 9 months during the last 18 months.
- I am a veteran and a member of a family that received food stamps for at least a 3-month period within the last 15 months.
- I was referred here by a rehabilitation agency approved by the state or the Department of Veterans Affairs.
- I am at least age 18 but **not** over age 24 and I am a member of a family that:
  a Received food stamps for the last 6 months, OR
  b Received food stamps for at least 3 of the last 5 months, BUT is no longer eligible to receive them.
- Within the past year, I was convicted of a felony or released from prison for a felony AND during the last 6 months I was a member of a low-income family.
- I received supplemental security income (SSI) benefits for any month ending within the last 60 days.

Welfare-to-Work Credit

3 ☐ Check here if you received a conditional certification from the SESA or a participating local agency for the Welfare-to-Work Credit.

4 ☐ Check here if you are a member of a family that:
- Received AFDC or successor program payments for at least the last 18 months, OR
- Received AFDC or successor program payments for any 18 months beginning after August 5, 1997, OR
- Stopped being eligible for AFDC or successor program payments after August 5, 1997, because Federal or state law limited the maximum time those payments could be made.

All Applicants

Under penalties of perjury, I declare that I gave the above information to the employer on or before the day I was offered a job, and it is, to the best of my knowledge, true, correct, and complete.

Job Applicant's signature ▸ [signature] Date: 03/20/04

For Privacy Act and Paperwork Reduction Act Notice, see page 2. Cat. No. 33962L Form 8850 (Rev. 10-02)

TRU0014

Formulario de reconocimiento del empleado

Este Manual del Empleado contiene información pertinente acerca de TruGreen y comprendo que debo consultar al departamento de servicios a las personas de TruGreen si tengo alguna pregunta que no haya sido respondida en este Manual.

Como las informaciones, políticas y beneficios aquí descritos están necesariamente sujetos a cambio, reconozco que podrán ocurrir revisiones de este Manual. También entiendo que las informaciones revisadas pueden suplantar, modificar o eliminar políticas existentes. Sólo el presidente de TruGreen Holding L.L.C. tiene la capacidad de adoptar cualquier revisión de las políticas contenidas en este Manual.

He comenzado mi relación de empleado con TruGreen voluntariamente y reconozco que no hay una duración especificada para mi empleo. Por lo tanto, yo mismo o TruGreen podemos terminar esta relación en cualquier momento si así lo deseamos, tanto con causa como sin causa.

Además reconozco que este Manual no constituye un contrato de empleo ni es un documento legal. He leído el contenido de este Manual y entiendo que es mi responsabilidad cumplir con las políticas contenidas en el Manual y en cualquier revisión futura del mismo.

[redacted] 03/20/04

[redacted]pleado

RAMON VILLANUEVA BAZALDUA

[redacted]ma o con letra de imprenta)

Gerente: Mantenga una copia de este formulario completado de reconocimiento del empleado en el archivo personal del empleado y envíe el original a Memphis con los documentos del nuevo empleado acabado de contratar.

ACUERDO SOBRE CONDICIONES LABORALES

1) Las condiciones laborales que las compañías norteamericanas contratantes (Patrones) proporcionan a los trabajadores tienen como fin proteger al empleado y al patrón. En base a las condiciones laborales, el patrón esta legalmente obligado a pagar lo estipulado en dicho documento, si el empleado no es remunerado de acuerdo a lo acordado, el o ella deberán de comunicarse a **L.L.S. International (81) 8040-7575 y 77** a fin de informar de esta situación

2) El número de horas trabajadas a la semana es solamente una estimación, por lo tanto, cada trabajador debe tener en cuenta, que las condiciones climatológicas y otros eventos imprevistos pueden afectar el total de horas trabajadas a la semana y por lo tanto su ingreso. Todos los desacuerdos deben ser discutidos con el patrón que les contrató **L.L.S. NO ES EL PATRON, favor de no comunicarse para tales asuntos.**

3) En el caso de que la Compañía Americana que lo contrató determine que por cuestiones climáticas o de fuerza mayor no puede seguir proporcionando trabajo al empleado durante el periodo que abarque su visa de trabajo; esta deberá cubrir los gastos del empleado a su lugar de origen, ya que el empleado no puede trabajar en otra Compañía en la que no este autorizada en su visa de trabajo Esta situación será estrictamente responsabilidad de la empresa contratante

4) El trabajador solo puede dejar su trabajo por causa de una emergencia, en dado caso el trabajador esta obligado a avisarle al patrón y pedir permiso por escrito. En caso de no ser así, o que el trabajador renuncie, o se vaya del lugar de trabajo sin avisar, se le avisará al I N S. y al Consulado Americano, el trabajador será considerado como ilegal y pierde toda protección dada por la visa de trabajo, esto resultará en la cancelación de su visa y el trabajador perderá la posibilidad de regresar el año entrante mediante el programa de visas H2B

5) El trabajador está de acuerdo y entiende que el servicio que presta **L.L.S. International** consiste estrictamente en el trámite de su visa de trabajo ante el Consulado Americano con su consentimiento y a petición de las Compañías Americanas contratantes Asimismo entiende que la obtención de la visa de trabajo no depende sino estrictamente del Consulado Americano, por lo que en caso de ser rechazada su solicitud, **L.L.S. International** no tiene responsabilidad alguna ni compromiso de indemnizar al solicitante, únicamente a reembolsarle el importe de 100 dólares por la tramitación de su visa

6) Los reembolsos solo proceden en los siguientes casos:
   - Cuando es rechazada su solicitud de visa en el consulado, en este caso se le regresarán 100 DÓLARES.
   - Cuando por parte de la empresa solicitante no se llegue a realizar el trabajo estando todavía en México, se procederá a colocar al trabajador en otra empresa, en caso de no ser posible se le regresarán 255 DÓLARES

   NOTA: En todos los demás casos NO PROCEDERA REEMBOLSO ALGUNO

7) El servicio de L.L.S. International, tiene un costo de:
   - 155 dólares (USD) para L L S. por gastos Administrativos

   Los siguientes pagos es lo que cobra el Consulado Americano:
   - 100 dólares (USD) por la tramitación de la visa en el Consulado
   - 100 dólares (USD) para el pago de derecho de visa en el Consulado

   Transporte;
   - 200 dólares (USD) aproximadamente de trasporte para su traslado vía terrestre.

   NOTA: Estos pagos se realizan hasta que la persona haya sido seleccionada, la persona haya aceptado el trabajo y tengan un lugar seguro en alguna Compañía.

8) L L S International o la compañía contratante en Estados Unidos no serán responsables de pagar y/o devolver sus gastos de viaje, ni los que se deriven del proceso de la visa en el Consulado Americano, **ESTA ES UNICAMENTE RESPONSABILIDAD DEL TRABAJADOR**

Este documento no asegura la obtención de trabajo.

Ramón Villanueva Barahona
Firma del Trabajador

20-Febrero-2004
Fecha

S International (Monterrey)
ampo No 427 Poniente
re Rayon y Aldama
' 64000
s : (81) 8040 7575 / 8040 7577

Villanueva
EXHIBIT NO. 4
AK 10/5/06

RV-0002

CERTIFICATE OF SERVICE

I, Michael P. Kelly, hereby certify that a true and correct copy of Defendants' Supplemental Brief in Further Support of its Opposition to Plaintiff's Expedited Motion to Conditionally Certify a FLSA Collective Action was served via e-file on this 3rd day of November, 2006, upon the following:

Vivian L. Rapposelli, Esquire (#3204)
Rapposelli, Castro & Gonzales
1300 Grant Ave., St. 100
Wilmington, DE 19806

/s/ Michael P. Kelly
Michael P. Kelly

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RAMON VILLANUEVA-BAZALDUA, individually and on behalf of others similarly situated,	)	
Plaintiff,	)	
v.	)	Civil Action No.: 06-185 GMS
TRUGREEN LIMITED PARTNERS and, TRUGREEN, INC., d/b/a TRUGREEN CHEMLAWN,	)	
Defendant.	)	

COMPENDIUM TO
DEFENDANT'S SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF ITS OPPOSITION TO PLAINTIFF'S EXPEDITED MOTION TO CONDITIONALLY CERTIFY A FLSA COLLECTIVE ACTION

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Dated: November 3, 2006

TABLE OF CONTENTS

1

Westlaw.
Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2005 WL 2291015 (W.D.Tex.), 10 Wage & Hour Cas.2d (BNA) 1753
(Cite as: 2005 WL 2291015 (W.D.Tex.))

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United States District Court,
W.D. Texas, El Paso Division.
Joe DE LA CRUZ, Jesus J. Duran, Robert Gutierrez, David Ortega, Lorenzo Pacheco, Jr., David Robinson, Fred Walker Jr., and Other Similarly Situated Persons, Plaintiffs,
v.
EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, Defendant.
No. EP-05-CV-206-FM.

Sept. 19, 2005.

David L. Kern, Peticolas, Shapleigh, Brandys & Kern, P.L.L.C., Mike Milligan, Attorney at Law, El Paso, TX, for Plaintiffs.

Clara B. Burns, El Paso, TX, for Defendant.

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR COLLECTIVE ACTION RECOGNITION

MONTALVO, J.

*1 On this date, the Court considered "Plaintiffs' Motion for Collective Action Recognition" [Rec. No. 8] and "Defendant's Response to Plaintiffs' Motion for Collective Action Recognition" [Rec. No. 10] filed in the above numbered and styled cause. After carefully considering the arguments and authorities, the Court is of the opinion that "Plaintiffs' Motion for Collective Action Recognition" [Rec. No. 8] should be DENIED.

Plaintiffs' suit alleges Defendant violated the Fair Labor Standards Act (FLSA) by failing to pay them the correct amount of earned wages. On July 27, 2005, Plaintiffs filed the instant motion requesting the Court enter an order allowing the case to proceed as an opt-in collective action pursuant to § 216(b) of the FLSA. *See* 29 U.S.C. § 216(b). Plaintiffs' statement defining the class declares: "The collective is comprised of all current and former employees of Defendant who worked for Defendant at any time from June 1, 2002 ... through the present and who were subjected to any of the unlawful pay or retaliation practices that the named Plaintiffs are complaining of in this case." [Rec. No. 8, pg. 2]. Unlike a class action filed under Federal Rule of Civil Procedure 23(c), a collective action under § 216(b) provides for a procedure to "opt-in," rather than "opt-out." *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1212-13 (5th Cir.1995).

Section 216(b) of the FLSA sets forth two core requirements to certify a collective action. Members of the putative class must be "similarly situated" and must provide "consent in writing ... in the court in which such action is brought." 29 U.S.C. § 216(b). The Fifth Circuit has not specifically addressed the meaning of "similarly situated" in this context. [FN1] However, courts have utilized two approaches to determine whether a plaintiffs are similarly situated and whether a case should proceed as a collective action. *Mooney*, 54 F.3d at 1213-16. The two-part approach, developed in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J.1987), requires the Court to decide whether the plaintiff has presented evidence that similarly situated plaintiffs exist. *See also Mooney*, 54 F.3d at 1213-15. The district court must decide, "usually based only on the pleadings and any affidavits which have been submitted," whether notice should be given to any potential plaintiffs. *Id.* at 1214. The decision "is made using a fairly lenient standard" and usually results in a conditional certification. *Id.* If the Court conditionally certifies the class, the case then proceeds through discovery as a representative action. *Id.* After the close of discovery, the defendant then files a motion for "decertification." *Id.* At this second stage, the Court makes a factual determination, using the information gained from discovery, on whether the putative class members are "similarly situated." *Id.* "If the class members are similarly situated, the district court allows the representative action to proceed to trial." *Id.* If not, the district court decertifies the class, dismisses without prejudice the opt-in plaintiffs, and allows the class representatives to proceed to trial on their individual claims. *Id.*

> FN1. *See Mooney*, 54 F.3d at 1213 (writing "In other words, this line of cases, by its nature, does not give a recognizable form to an ADEA representative class, but lends itself to *ad hoc* analysis on a case-by-case basis.").

*2 The alternative to the two-part test is to analyze the factors applicable to Rule 23 class action

certification: numerosity, commonality, typicality, and adequacy of representation. *See* *Shushan v. University of Colorado,* 132 F.R.D. 263 (D.Colo.1990). Our Circuit has expressly refused to endorse either method over the other. *Mooney,* 54 F.3d at 1216. Because the two-stage approach appears to be the method of analysis more generally accepted, the Court will analyze the instant motion under the two-part approach.

Plaintiffs describe themselves as "ditch riders, dispatchers, river team members, and/or maintenance workers." [Rec. No. 3, pg. 1]. It is alleged by Plaintiffs that Defendant violated the "FLSA by failing to pay Plaintiffs and other similarly situated employees, or former employees, for the hours worked by such employees in excess of forty (40) hours per week at a rate not less than one and one-half times the regular hourly rate at which such employees were compensated." [Rec. No. 3, pg 3]. Plaintiffs argue that a collective action of similarly situated Plaintiffs is the appropriate method for the fair and efficient adjudication of the controversy. In opposition, Defendant argues Plaintiffs have not met their burden and put forth allegations supported by evidence that there are similarly situated employees who should have the chance to opt-in. Defendant further argues that Plaintiffs' assertions, if taken as true, show that Plaintiffs in fact were not similarly situated because the different job titles identified by Plaintiffs "connote[ ] totally different duties, responsibilities, and working conditions." [Rec. No. 10, pg. 5]. Plaintiffs correctly cite to *Mooney v. Aramco Services Co.* for the proposition that the initial burden on plaintiffs is a lenient one and only a "modest factual showing" is required to meet this burden. 54 F.3d 1207, 1214 (5th Cir.1995). However, this Court finds that Plaintiffs in the instant case have failed to even present a modest factual showing that Plaintiffs are "similarly situated."

The Court finds Plaintiffs have failed the first step of the two-step approach. While the Court recognizes the standard for satisfying the first step is "fairly lenient standard," the Plaintiff has failed to provide any evidence that others were similarly situated. Plaintiffs are required to make "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." *H & R Block,* 186 F.R.D. at 400 (quoting *Mooney,* 54 F.3d at 1214 n. 8). The evidence before the Court includes only unsupported assertions of violations that are not sufficient to meet Plaintiff's burden. No affidavits that would provide evidence that others are similarly situated was submitted by Plaintiffs. Plaintiffs produce only conclusory statements that do not even meet a "modest factual showing." Having found that the evidence presented by Plaintiffs fails to sufficiently demonstrate that "similarly situated" Plaintiffs exist, Plaintiffs' motion to certify a collective action under 29 U.S.C. § 216(b) is DENIED.

***3** IT IS THEREFORE ORDERED that "Plaintiffs' Motion for Collective Action Recognition" [Rec. No. 8] is DENIED.

Not Reported in F.Supp.2d, 2005 WL 2291015 (W.D.Tex.), 10 Wage & Hour Cas.2d (BNA) 1753

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2

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Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 945139 (E.D.Pa.)
(Cite as: 2004 WL 945139 (E.D.Pa.))

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
Richard LAWRENCE, et al., Plaintiff,
v.
THE CITY OF PHILADELPHIA, PENNSYLVANIA, Defendant
No. 03-CV-4009.

April 29, 2004.

Robert A. Jones, Chamberlain Kaufman and Jones, Albany, NY, Solomon Z. Krevsky, Solomon Z. Krevsky, LLC, Harrisburg, PA, for Plaintiffs.

George A. Voegele, Jr., Mark J. Foley, Victoria L. Zellers, Klett Rooney Lieber & Schorling, Philadelphia, PA, for Defendant.

MEMORANDUM

GREEN, J.

*1 Presently before the Court is Defendant's Motion for Misjoinder of Claims and Plaintiffs' Opposition thereto. For the reasons set forth below, Defendant's motion will be granted.

Background

Plaintiffs filed a Complaint against Defendant City of Philadelphia ("City"), alleging that Defendant violated the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*. ("FLSA"), based on an alleged failure to pay Plaintiffs overtime wages for scheduled hours worked in excess of forty (40) in a single workweek. Plaintiffs also claim that Defendant's failure to pay Plaintiffs for unscheduled "off-the-clock" time, spent replenishing supplies before or after compensated hours, violates the overtime wage requirement under the FLSA. Plaintiffs seek to maintain both claims in a collective action against Defendant for FLSA overtime wage violations, as authorized by FLSA § 216(b). Plaintiffs are all current or former employees of Defendant who worked as Fire Service Paramedics. Subsequent to the filing of the Complaint, Plaintiffs filed numerous opt-in consent forms for Fire Service Paramedics to become plaintiffs in this action.

Defendant's Motion for Misjoinder of Claims

Defendant presently moves for misjoinder of Plaintiff's off-the-clock claims pursuant to Federal Rule of Civil Procedure 21, and in the alternative for dismissal of the collective action pursuant to 29 U.S.C. § 216(b). Defendant argues that, unlike the claim based on overtime compensation for regularly scheduled hours, the "off-the-clock" claim is based on allegations of hours worked beyond a regular schedule, requiring an individual case-by-case analysis for each Plaintiff. In order to meet the FLSA § 216(b) collective action requirement for plaintiffs to be similarly situated to each other, Defendant argues that this Court should look at variations in employment activities, oversight and instruction, whether plaintiffs worked in different geographic locations, and discretionary powers given to plaintiffs.

On the other hand, Plaintiffs contend that the "similarly situated" requirement under FLSA § 216(b) is unrelated to the requirements for class action plaintiffs pursuant to Fed.R.Civ.P. 23, and is less strict than the requirements for joinder under Fed.R .Civ.P. 20(a). Urging this Court to adopt a lenient standard for the "similarly situated" requirement, Plaintiffs rely upon *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51 (3rd Cir.1989), and argue that they are similarly situated for FLSA § 216(b) purposes because although they work in different locations: (1) all members of the collective action work(ed) in the Fire Department's Emergency Medical Services Unit; (2) their claims all arise from the same pattern, plan or practice of Defendant; and, (3) they all seek the same form of relief--unpaid overtime compensation, liquidated damages, costs and attorneys' fees.

Discussion

Section 216(b) of the FLSA reads, in pertinent part, "[a]n action to recover ... may be maintained against any employer (including a public agency) ... by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Under Fed.R.Civ.P.

21, however, "[a]ny claim against a party may be severed and proceeded with separately." Fed.R.Civ.P. 21. In *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3rd Cir.1989), *overruled on other grounds,* the Third Circuit applied a three-prong test for determining whether plaintiffs are similarly situated under FLSA § 216(b): (1) whether they all worked in the same corporate department, division and location; (2) whether they all advanced similar claims; and (3) whether they sought substantially the same form of relief. *See, Lockhart,* 879 F.2d at 51 (citing *Plummer v. General Electric Co.*, 93 F.R.D. 311, 312 (E.D.Pa.1981)). As a result, Plaintiffs pursuing a collective action under FLSA § 216(b) only need to show that their positions are "similar, not identical" to each other. *Sperling v. Hoffman-LaRoche,* 118 F.R.D. 392, 407 (D.N.J.1988), *aff'd in part and appeal dismissed in part,* 862 F.2d 439 (3rd Cir.1988), *aff'd, Hoffman-LaRoche, Inc. v. Sperling,* 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989).

***2** In the instant matter, all current and prospective plaintiffs are or were employed as Fire Service Paramedics within the City Fire Department's Emergency Medical Services Unit. According to Defendant's Personnel Department, each of the current Plaintiffs, and potential opt-in plaintiffs, is classified as a "Fire Service Paramedic" and has the same general job description. However, Plaintiffs work in different unit types, different platoons, different locations, and have different supervisors. Unlike the Plaintiffs' first claim, alleging failure to pay overtime wages for scheduled hours worked in excess of 40 in a single workweek, the "off-the-clock" claim does not involve regularly scheduled time that is worked by all members of the class. Rather, each of the Plaintiffs may potentially claim that on any given day he or she arrived early or departed outside of their regularly scheduled hours and were not compensated for such. The circumstances of those individual claims potentially vary too widely to conclude that in regard to their "off-the-clock" claim, the Plaintiffs are similarly situated. The questions of fact will likely differ for each Plaintiff and will be unduly burdensome to both Defendant and to the Court in managing as a collective claim. Consequently, Plaintiffs' "off-the-clock" claim for unpaid work performed outside of their regularly scheduled hours will be severed from the collective claim for unpaid overtime for regularly scheduled hours. Plaintiffs' claims for "off-the-clock" unpaid work, will be dismissed without prejudice to each plaintiff filing said claim individually. The lead Plaintiff in this matter, Richard Lawrence, will be able to proceed in this civil action with his individual "off-the-clock" claim.

With regard to Plaintiffs' claims for unpaid overtime for regularly scheduled hours in excess of forty in a single work week, the court finds that the Plaintiffs are similarly situated for purposes of maintaining a collective action pursuant to FLSA § 216(b). Plaintiffs allege that they should be paid overtime for all weeks in which their regularly scheduled working hours exceed forty per week. This claim is the same for each Plaintiff. In its motion for misjoinder, Defendant does not assert that the Plaintiffs are not similarly situated for purposes of this claim. The Court, therefore, will permit Plaintiffs to maintain a collective active regarding their regularly scheduled hours claim. Defendant's alternative motion for dismissal of the entire action under FLSA § 216(b) will be denied.

Finally, in *Hoffman-LaRoche, Inc. v. Sperling,* 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989), the Supreme Court clearly stated that collective actions maintained under FLSA § 216(b) authorize a district court to issue court-approved notice to additional potential plaintiffs at its discretion. This Court concludes that court-supervised notice is appropriate in the interest of promoting judicial economy and an efficient resolution to the collective action claim in this case.

***3** An appropriate order follows.

ORDER

AND NOW, this day of April, 2004, IT IS HEREBY ORDERED that, Defendant City of Philadelphia's Motion for Misjoinder of Claims is GRANTED, and Defendant City of Philadelphia's alternative Motion to Dismiss the entire collective action is DENIED. With the exception of the lead Plaintiff in this action, Richard Lawrence, all other Plaintiffs' claims for wages for hours for which Plaintiffs were allegedly not paid for either reporting early or departing after their regularly scheduled hours are severed from this action and dismissed without prejudice to each Plaintiff filing a separate action for said claim. If any said action is filed, it is to be randomly assigned.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Approval of Notice to Prospective Additional Plaintiffs and for Discovery is GRANTED to the extent that it applies only to the collective action claim permitted as a result of this Order. The form of Notice as set forth in Exhibit No. 6 to the Declaration of Robert A. Jones shall be revised to remove all

references to the claims dismissed as a result of this order. Defendant shall provide to Plaintiffs' counsel, within fifteen (45) days of this Order, the last known names and addresses of all such similarly situated current and former employees who have worked as Fire Service Paramedics at any time from July 7, 2000 to the present date.

Not Reported in F.Supp.2d, 2004 WL 945139 (E.D.Pa.)

Motions, Pleadings and Filings (Back to top)

• 2004 WL 2717159 (Trial Motion, Memorandum and Affidavit) Defendant City of Philadelphia's Response in Opposition to Plaintiffs' Motion to Compel (Jul. 6, 2004)Original Image of this Document (PDF)

• 2004 WL 2717155 (Trial Motion, Memorandum and Affidavit) Defendant City of Philadelphia's Reply to Plaintiffs' Opposition to Defendant's Motion for Misjoinder of Claims and in the Alternative for Dismissal of the Collective Action and Response to Plaintiffs' Motion for Opt-in Notice (Jan. 16, 2004)Original Image of this Document (PDF)

• 2003 WL 23903760 (Trial Motion, Memorandum and Affidavit) Defendant City of Philadelphia's Motion for Misjoinder of Claims and in the Alternative for Dismissal of the Collective Action (Dec. 11, 2003)Original Image of this Document (PDF)

• 2003 WL 23903747 (Trial Pleading) Defendant's Answer to Plaintiffs' Complaint (Sep. 22, 2003)Original Image of this Document (PDF)

• 2:03cv04009 (Docket) (Jul. 07, 2003)

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3

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Not Reported in F.Supp.2d, 2006 WL 42368 (D.N.J.)
(Cite as: 2006 WL 42368 (D.N.J.))

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
Ronald MOECK and James Wilbur, Jr., on behalf of themselves and all others
similarly situated Plaintiffs,
v.
GRAY SUPPLY CORPORATION, Defendant.
No. 03-1950 (WGB).

Jan. 6, 2006.

Jed Mendelson, Mark Tabakman, Grotta, Glassman & Hoffman, P.A., Roseland, New Jersey, for Defendant Gray Supply Corporation.

Paul G. Hunezak, Stephen A. Snyder, Morris, Downing & Sherred, LLP, Newton, New Jersey, for Plaintiffs.

MEMORANDUM OPINION

BASSLER, Senior J.

*1 Plaintiffs, former employees of Defendant Gray Supply Corporation ("Company" or "Gray"), claim that Defendant failed to pay Plaintiffs overtime that they were entitled to, which violated the Fair Labor Standards Act ("FLSA") and the New Jersey Wage and Hour Law ("Wage and Hour Law"). Plaintiffs also bring claims for fraud and negligent misrepresentation. Defendant now moves for summary judgment, and Plaintiffs move to certify a class on behalf of similarly situated employees who were required by Defendant to work overtime without pay.

I. Factual Background [FN1]

FN1. All facts have been construed in the light most favorable to Plaintiffs, the nonmoving party. *Boyle v. Allegheny Pennsylvania*, 139 F.3d 386, 393 (3d Cir.1998).

Defendant Gray is in the business of installing natural gas lines and mains for residential and commercial purposes. Amended Complaint ("Am.Compl.") ¶ 2. The assigned work hours for employees at Gray is from 7:30AM to 4:00PM with a thirty-minute lunch break. Declaration of Tabakman ("Tabakman Dec."), Moeck Dep., Ex., B 86:20-87:11. Employees are required to work an additional thirty minutes at both the beginning and the end of their shifts. Tabakman Dec., Dipasquale Dep., Ex. E, 20:20-21:13, 26:23-27:13. This time is referred to as "free time" by Gray's management. *Id.* Plaintiffs claim that since 1991, they and other Gray employees have not received pay for this additional hour worked. Am. Compl. ¶ 16. They further allege that they were informed that refusal to work overtime was grounds for termination. Tabakman Dec., Wilbur Dep., Ex. D, 53:13-14.

Plaintiff Moeck has worked for Gray three times. He began working around 1991 or 1992 until February 2002. He left for a year and returned to work at Gray from 1994 to 1996. He then left for another year and joined the Company again in 1997 until he resigned in February 2002. Tabakman Dec., Moeck Dep., Ex. B, 7:20-24; 8:22-10:5; 11:14-20; 12:17-13:12; 13:25-14:10. Moeck testified that he had complained to the shop steward of his union and to his supervisors since 1992 about having to work free time. *Id.* at 19:23-20:2; 21:2-22:8; 23:5- 24:4, 35:8-19.

Plaintiff Wilbur began working for Gray in 1994. Tabakman Dec., Wilbur Dep., Ex. D, 12:8-12. After his first day of employment, he was informed that he should be at work a half hour early. *Id.*, 50:6-51:13; 127:4-128:8; 129:9- 12. Wilbur also testified that he complained to his shop steward. *Id.* at 17:11-23; 55:17-25. Wilbur was laid off from Gray on April 4, 2002. *Id.* at 35:4-10.

At issue here is:

- Whether the FLSA preempts Plaintiffs' state common law claims.
- Whether the Labor Management Relations Act preempts all of Plaintiffs' claims.
- Whether Plaintiff Wilbur's FLSA and New Jersey Wage and Hour Law claims are time-barred.

The Court finds that the FLSA does preempt Plaintiffs' state common law claims, the Labor Management Relations Act does not preempt Plaintiffs' FLSA action and Wilbur's Wage and Hour

Law claims are time-barred.

This Court has jurisdiction over this case pursuant to 28 U.S.C. § § 1331 & 1337(a) and supplemental jurisdiction over the remaining New Jersey statutory and common-law claims pursuant to 28 U.S.C. § 1367.

II. Fraud and Misrepresentation Claims Preempted by FLSA

***2** Counts three through six-Plaintiffs' fraud and negligent misrepresentation causes of action based on Gray's alleged affirmative misrepresentation and failure to disclose-are derived completely from Plaintiffs' overtime claims. Defendant argues that these counts are therefore preempted by the FLSA. The Court agrees.

Although the law is unsettled as to whether the FLSA preempts state common law causes of action, most courts have held that claims directly covered by the FLSA (such as overtime), must be brought under the FLSA. *See e.g., Chen v. Street Beat Sportswear Inc.*, 364 F.Supp.2d 269 (E.D.N.Y.2005). Courts that have considered this issue analyze whether the FLSA and common law claims are grounded in the same facts. *Petras v. Johnson,* No. 92 CIV. 8298(CSH), 1993 WL 228014, at *3 (S.D.N.Y. June 22, 1993) is instructive.

In *Petras,* which is similar to this case, the plaintiff alleged "fraud on the ground that the defendants knowingly and with intent to misrepresent and deceive the plaintiff made false representations to him to lead him to believe that he was not entitled to overtime compensation." *Id.* The court held that plaintiff's allegations of fraud "lies simply in concealing plaintiff's rights under the FLSA" and that the FLSA was the exclusive remedy for overtime payments. *Id; see also Alexander v. Vesta Ins. Group, Inc.*, 147 F.Supp.2d 1223, 1240-41 (N.D.Ala.2001) (holding plaintiffs could not merely recast "FLSA claims as common law claims" to recover damages not available under the FLSA); *Johnston v. Davis Sec., Inc.*, 217 F.Supp.2d 1224, 1227-28 (D.Utah 2002) (finding that plaintiff's common law claims, including gross negligence and negligent misrepresentation, were preempted under the FLSA because they were based on same facts and circumstances).

Likewise, Plaintiffs' contentions that Defendants "materially misrepresented" that its employees "would be paid for overtime" and "concealed the fact ... that they [Defendant's employees] would be compelled to work additional time without compensation" merely are based on Plaintiffs' overtime claims. Am. Compl. ¶ ¶ 31,38,46,51. These claims are, therefore, preempted by the FLSA. [FN2]

> FN2. Because the Court has determined that these claims are preempted by the FLSA, the Court finds it unnecessary to address Defendant's argument that the state common law claims are time-barred and that Plaintiffs have failed to state a prima facie case for these claims.

III. Labor Relations Management Act Preemption

Gray argues that Plaintiffs' entire action is prohibited by the Labor Management Relations Act ("LMRA"), which was designed to encourage employees to promote their interests collectively. Defendants contend that Plaintiffs' claims are founded "directly on rights created by a collective bargaining agreement." Gray Memorandum of Law ("Gray Mem.") at 15. In *Barrantine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), however, the Supreme Court held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies that the Act was designed to effectuate. Moreover, the Court held that congressionally granted FLSA rights take precedence over any conflicting provisions in a collectively bargained compensation arrangement.

***3** Under the FLSA, covered employers may not employ any employee "for a workweek longer than forty hours unless such employee receives compensation for his employment ... at a rate not less than one and one-half times the regular rate at which he is employed ." 29 U.S.C. § 207(a)(1). Plaintiffs' action is wholly based on "overtime wages to which they are entitled but have not received." Am. Compl. ¶ 4. The Supreme Court specifically stated in *Barrentine* that the complex questions of fact and law, "e.g., what constitutes the 'regular rate,' the 'workweek,' or 'principal' rather than 'preliminary or postliminary' activities are statutory questions properly resolved under the FLSA." *Barrantine,* 450 U.S. at 728.

Plaintiffs correctly assert that the case relied on by Gray is inapposite to this one. *Valdino v. Valley Engineers,* 903 F.2d 254 (3d Cir1990) involved the proper wage rate that should be applied to a worker,

who claimed he should be compensated at the rate of a "journeyman" under the contract. The Third Circuit held that the LMRA preempted the FLSA where the plaintiff's claims "rest on interpretations of the underlying collective bargaining agreement ." *Id.* at 266. That is not the case here. Plaintiffs' claims are not based on an interpretation of the collective bargaining agreement with respect to the appropriate wage rate, but are based on their contention that they are entitled to overtime. Plaintiffs are not barred by the LMRA from pursuing these claims under the FLSA merely because its contractual and statutory rights arise from the same factual occurrence.

IV. Wilbur's FLSA and Wage and Labor Law Claims

A. FLSA

The statutory scheme of the FLSA presumes a two-year statute of limitations but provides for a longer, three-year period if a plaintiff can show that the defendant's violation of the FLSA has been "willful." 29 U.S.C. § 255(a). The Supreme Court in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988), held that the term "willful" means "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."

Plaintiffs and Leo Dipasquale-a non-party witness-have testified that they repeatedly complained to their supervisors about not receiving overtime pay and nothing was ever done about it. Tabakman Dec., Moeck Dep., Ex. B. 40:7-42:25; Tabakman Dec., Dipasquale Dep., Ex. E. 36:25-39:24; 65:23-66:18. Plaintiff Moeck also testified that after he complained about being required to work "free time" without pay, his supervisor informed him that "if [he or other employees] didn't want to do the time, to find a new job." Tabakman Dec., Moeck Dep., Ex. B, 26:24-27:1. Dipasquale further noted during his deposition that the policy requiring "free time" at Gray ended only a couple of weeks prior to his deposition. Dipasquale Dep., Ex. E. 68:22-69:7.

As the collective bargaining agreement governing Gray's relationship with union employees expressly follows the FLSA stating that [a]ll time worked in excess of eight hours shall be paid at the rate of time and one-half the applicable rate, the Court finds that Plaintiffs have raised a genuine issue of material fact that Gray's conduct was a "willful" violation of the FLSA. Therefore, the Court finds that since the amended complaint was filed on April 28, 2004 and Plaintiff Wilbur was laid off in April 2002, his FLSA claim is timely. [FN3]

> FN3. The courts uniformly have adopted the approach that under the FLSA "a separate cause of action accrued each payday when the [employer] excluded the overtime compensation claim." Although Plaintiffs Wilbur and Moeck may not be entitled to claims made prior to the three-year statutory period, Defendant Gray has not raised this argument and the Court is therefore reluctant to address it.

B. Wage and Hour Law

***4** A year after its enactment, the Wage and Hour Law was amended to add a two-year statute of limitations. *Troise v. Extel Commc'n., Inc.*, 345 N.J.Super. 231, 784 A.2d 748 (App.Div.2001). The Wage and Hour Law, however, does not contain a provision similar to the FLSA which makes an exception for willful conduct. Therefore, Wilbur's action is not timely with regard to the Wage and Hour Law. [FN4]

> FN4. Although Plaintiffs argue that the date Gray states Wilbur was laid off, April 4, 2002, is in dispute, Plaintiffs have provided no evidence to rebut the Defendant's evidence to show that this date is incorrect. Plaintiffs' Memorandum of Law ("Pls.Mem.") at 9, n. 3.

Plaintiffs argue, however, that it is well-settled that the commencement of a class action tolls the statute of limitation as to all putative class members. Pls. Mem. at 9; (citing *Crown, Cork & Seal Co., Inc., v. Parker*, 462 U.S. 345, 353-54, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983)). Although Plaintiffs are correct in its assertion, commencement of an action as a class action suspends the applicable statute of limitations during the interim period *from commencement until refusal to certify the class.* *Ravitch v. Pricewaterhouse*, 793 A.2d 939 (Penn.2002) (emphasis added). The statute of limitations for Wilbur's Wage and Hour Law claim had already expired before the class action suit had even been filed, therefore, his claim cannot be tolled pursuant to this rule.

V. Plaintiffs' Class Certification Motion

A. FLSA

Class actions under the FLSA are governed by 29 U.S.C. § 216(b). Unlike Federal Rule of Civil Procedure Rule 23, § 216(b) of the FLSA establishes an opt-in system for collective actions, mandating that "[n]o employee shall be a party plaintiff to any such action [under the FLSA] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

Under § 216(b), there are two threshold requirements for an action to proceed as a collective action: (1) class members must be "similarly situated" and (2) all members must affirmatively consent to join the action. *Goldman v. Radio Shack Corp.*, No. 2:03-CV-0032, 2003 U.S. Dist. LEXIS 7611 (E.D. Pa. April 17, 2001).

In the absence of Third Circuit or Supreme Court guidance on who are "similarly situated" employees under § 216(b), a two tier test has developed amongst district courts in the Third Circuit. *Id.* at * 20; *see also Morisky v. Public Serv. Elec. & Gas Co.*, 111 F.Supp.2d 493 (D.N.J.2000). At the "notice stage"-where the court determines whether notice should be given to potential class members-the court's determination typically results in "conditional certification" of a representative class. *Morisky*, 111 F.Supp.2d at 497. At this stage, some courts have required nothing more than "substantial allegations that the putative class members were together the victims of a single decision, policy or plan." *Id.* [FN5] In the second stage, after the court has more evidence and the case is ready for trial, the court applies a stricter standard.

> FN5. Although Defendant's assert that the Court should apply the modest factual showing standard applied by some courts in the first stage, the Court finds it unnecessary to address this issue as Plaintiffs' have failed to satisfy the more lenient standard.

Even though court's have recognized that the notice stage, which this case is currently in, is a lenient standard, the Court finds that Plaintiffs have failed to meet this standard. Plaintiffs have provided little evidence that the class members that they seek to represent were the victims of a single policy, decision or plan.

*5 Plaintiffs have established that one supervisor, Shawn McCord, required his workers to work "free time." *See e.g.*, Tabakman Dec., DiPasquale Dep., Ex. E, 36:3-38:9, 45:17-19. Although Plaintiff Moeck mentions Ed Smock as another supervisor who had used the phrase "free time," Plaintiffs have failed to establish that other supervisors employed the same policies as McCord. Although Plaintiffs intend on representing "all employees of Gray Supply who have and are required by Gray Supply to work in excess of forty (40) hours," based on Plaintiffs' own testimony, practices and reporting requirements are different at each of the four "yards" where Plaintiffs and potential class members work. *See e.g.*, Tabakman Dec., Moeck Dep., Ex. B, 106:11-18. Plaintiffs further admit that at times they were allowed to drive directly to and from a project site. *See* Tabakman Dec., Moeck Dep., Ex. B, 70:20-71-9 (Moeck testified for at least six months he drove directly to and from his project site and was not entitled to overtime payments during that period). In addition, there was a call-in policy that at least DiPasquale was aware of, which allowed him to call into the office the night before and find out the location of his job so that he could go there directly, which kept him from having to work "free time." Tabakman Dec., DiPasquale Dep., Ex. E, 54;12-24.

Because of the many potential distinctions of each putative class member's claim, the Court finds that this case is not an appropriate one for class action certification, even at this early stage in the action. Based on the current evidence, the proposed class is not "similarly situated" or the victims of a single policy or plan. The Court also believes that this determination is consistent with § 216(b) of the FLSA's purpose, which was to limit private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers from the burden of representative actions, therefore, the Court denies certification.

B. Wage and Hour Law

Plaintiff Moeck's Wage and Hour Law claim is also not suitable for class action treatment. First, as discussed above, Congress created the opt-in procedure under the FLSA for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers from the burden of representative actions. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). Allowing Plaintiff Moeck to circumvent the opt-in requirement and bring unnamed parties into federal court by calling upon state statutes similar to the FLSA would undermine Congress's intent to limit these types of claims to collective actions. *See McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574 (N.D.Ill.2004).

Second, under Federal Rule of Civil Procedure Rule 23, which governs other class action claims, Plaintiffs would have to meet the prerequisites of commonality and typicality, amongst other things. As discussed above, Plaintiffs have failed to show that common issues predominate over individual issues or that their claims are typical of others in the class. *Mulder v. PCS Health Systems, Inc.*, 216 F.R.D. 307 (D.N.J.2003).

VI. Conclusion

***6** For the reasons stated in this Opinion, this Court denies Defendant's motion for summary judgment on Count One, grants Defendant's motion for summary judgment on Count Two with regard to Plaintiff Wilbur and grants Defendant's motion for summary judgment on Counts Three, Four, Five and Six. The Court further denies Plaintiffs' motion for class certification.

An appropriate Order accompanies this Opinion.

Not Reported in F.Supp.2d, 2006 WL 42368 (D.N.J.)

Motions, Pleadings and Filings **(Back to top)**

• 2004 WL 3373359 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Motion for Summary Judgment of Defendant Gray Supply Corporation, Inc. (Jun. 17, 2004)

• 2004 WL 3373357 (Trial Pleading) First Amended Answer (May 3, 2004)

• 2004 WL 3373356 (Trial Pleading) Plaintiffs' First Amended Complaint (Apr. 28, 2004)

• 2:03CV01950 (Docket) (Apr. 30, 2003)

END OF DOCUMENT

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Westlaw.
Not Reported in F.Supp.
Not Reported in F.Supp., 1992 WL 566321 (D.Ariz.)
(Cite as: 1992 WL 566321 (D.Ariz.))

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Only the Westlaw citation is currently available.

United States District Court, D. Arizona.
Pat WERTHEIM, on behalf of himself and others similarly situated, Plaintiffs,
v.
STATE of ARIZONA; and Arizona Department of Public Safety, Defendants.
No. CIV. 92-0453 PHX RCB.

Aug. 4, 1992.

Joseph W. Bell, Fredrick P. Furth, Daniel S. Mason, Furth Fahrner & Mason, San Francisco, CA, R. Chip Larsen, James J. Farley, Farley Robinson & Larsen, Mesa, AZ, for Pat A. Wertheim.

Michael K. Kennedy, Gallagher & Kennedy, Phoenix, AZ, for State of Arizona, Department of Public Safety, (Arizona).

ORDER

BROOMFIELD, District Judge.

*1 Plaintiff moves for an order authorizing him to provide notice of this action to other employees of the State of Arizona who may be similarly situated (Opt-In Class), approving the form of a proposed notice and consent, and requiring defendants to provide plaintiff with the names and addresses of members of the Opt-In Class. Defendants object to the definition of the Opt-In Class proposed by plaintiff and raise specific objections to the proposed form of notice and consent. The matter has been fully briefed. Defendants also filed a separate motion to strike certain portions of the affidavits of Robert Tavernaro and Steven Anderson attached as exhibits to plaintiff's motion. Plaintiff responded to the motion to strike but defendants did not reply. The court has heard oral argument on both motions.

Plaintiff was employed by the State of Arizona, Department of Public Safety ("DPS") on March 5, 1989 in the position of Latent Prints Examiner ("LPE") II; he has since been promoted to LPE III. The positions of LPE II and III are classified as exempt for purposes of the Fair Labor Standards Act ("FLSA"). Defendants assert the positions are properly classified as exempt because they are "professional" occupations. Plaintiff complains that the positions have been misclassified and that as a result he has been denied overtime pay and pay for on-call time, in violation of FLSA statutes and regulations. Plaintiff brought this action on his own behalf and on behalf of others similarly situated to recover unpaid overtime compensation, an equal sum in liquidated damages, interest, fees and costs, pursuant to 29 U.S.C. § 216(b) [FN1].

Plaintiff seeks an order authorizing him to send notice of the action and a form of consent to "others similarly situated" in accordance with the Supreme Court's recent approval of such procedures in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). Plaintiff contends that this Opt-In Class should include:

> All present or former employees of the State of Arizona who, at any time since March 10, 1989, worked overtime hours without receiving overtime pay and/or were not paid for time spent in restricted on-call status.

Plaintiff contends this class definition complies with the test established by the Ninth Circuit in *Church v. Consolidated Freightways, Inc.* for determining whether the plaintiff and class members were "similarly situated." *Church*, 137 F.R.D. 294 (N.D.Cal.1991). Plaintiff asserts that defendants tried to avoid paying overtime wages mandated by FLSA by incorrectly classifying employee positions as exempt based on their rate of pay rather than on the criteria required to be applied under FLSA. Plaintiff further alleges all members of the defined class were "affected by a similar plan," *Church*, 137 F.R.D. at 308, in the sense that the defendants classified non-exempt employees as exempt and failed to pay them for restricted on-call time.

*2 Plaintiff also seeks approval of a notice and form of consent to be sent to members of the Opt-In Class. Plaintiff asserts that the proposed notice and consent attached to the motion is "clear, fair and accurate" and tracks the language of notices and consent forms approved in other cases.

Finally, plaintiff seeks an order requiring defendants to produce a list of the names and addresses of the Opt-In Class within 15 days of the date of the hearing for use in mailing the notice and consent form to class members. Plaintiff argues that the Court in *Sperling* approved discovery of this information in

order to facilitate early notice to potential class members. In addition, plaintiff reminds the court that the statute of limitations for actions brought under § 216(b) does not toll for any opt-in plaintiff until written consent has been filed.

Defendants object to plaintiff's inclusion of all state employees in the Opt-In Class. First, defendants argue that classifications for DPS employees are determined exclusively by a Law Enforcement Merit Systems Council ("LEMSC") which has no function outside the DPS. For that reason, defendants argue that classifications are not made by a "centralized decision-making process" as plaintiff has alleged, and the classifications and job conditions of employees in other state agencies and entities are unrelated to those of DPS employees. Further, defendants argue that the class plaintiff proposes is so overly broad as to include attorneys and elected officials who clearly are exempt under the statutes and regulations and not intended to be included in the class. Finally, defendants argue that the only foundation asserted by plaintiffs in support of the broad class definition is affidavits of plaintiff and two other LPEs which pertain solely to their own positions in the DPS. [FN2]

Defendants would restrict the Opt-In Class to persons employed by the DPS in the position of LPE II or LPE III. Defendants argue that classifications are fact-specific determinations that require investigation and study because of the varying specific requirements for each of the three white-collar exemptions: executive, administrative and professional. Defendants assert that the LEMSC classifies positions based on the requirements of the statute and regulations pertaining to these exemptions and deny that this determination is based solely on pay grade as plaintiff alleges.

As a second basis for limiting the Opt-In Class to persons employed as LPE II or LPE III, defendants maintain that the on-call restrictions vary greatly among the large variety of DPS positions that require on-call status, depending upon the unique demands made on various departments and the availability of personnel to meet those demands. Defendants deny there is any uniform policy within DPS concerning such restrictions and argue that plaintiff's limited experience with the restrictions placed on LPE II and III employees in Tucson does not provide grounds for asserting that other DPS employees in positions requiring on-call status are "similarly situated" for purposes of this action.

*3 Finally, defendants contend notice is not necessary to adequately inform potential class members of this action because notice and a consent form similar to that proposed by this motion were previously sent to all members of the Associated Highway Patrolmen of Arizona ("AHPA"). Defendants further argue, however, that the notice sent to AHPA members is likely to mislead persons not similarly situated to plaintiff to believe they may be part of the class. Consequently, defendants urge the court to treat any opt-in notices received as a result of that mailing with suspicion.

The court finds plaintiff has failed to make even a prima facie showing in support of his proposed definition of the Opt-In Class. First, plaintiff has shown no credible evidence in support of his allegation that he was deprived of overtime and on-call compensation as the result of a "centralized decision making process" that affected all employees of the State of Arizona. Defendants have demonstrated that the classification of LPE II and LPE III as exempt positions was made by a body whose determinations affected only DPS employees. The only evidence suggesting that all state employees are classified using the same method allegedly used by the LEMSC is a statement by another LPE, Robert Taverno, that he has been "informed" that was the case. Tavernaro Affidavit ¶ 6. This is one of the statements defendants have moved to strike. The court will grant that motion. Plaintiff may be correct that the evidence offered in support of a preliminary notice determination need not meet Rule 56(e) standards of admissibility. Tavern's statement, however, is so lacking in foundation that, even if admissible, it deserves no weight whatsoever. Tavernaro does not even go so far as to identify the source of the "information" he purports to have received.

Second, plaintiff's definition would include employees classified as non-exempt who nevertheless did not receive overtime pay for overtime work or for time spent in on-call status restrictions sufficient to require compensation under the FLSA. Any claims of such employees would necessarily have a totally different factual basis from plaintiff who alleges that he did not receive compensation for overtime work solely because he was misclassified as exempt. Thus, to the extent the Opt-In Class includes employees not paid an overtime rate for overtime work, the class must be restricted to DPS employees classified as exempt during the relevant period.

Third, plaintiff's allegation that the LEMSC

classified positions as exempt based solely on the position's pay grade is unsupported by any credible evidence. Again, plaintiff alleges only "preliminary indications" that classifications were based on pay grade and cites in support only Tavernaro's affidavit. Again, Tavernaro bases his assertion solely on "information" he received from some unidentified source in the Human Resources Department of DPS. Tavernaro Affidavit ¶ 6. Defendants respond with an equally unsupported assertion that exempt classifications were based on "investigation and study" and on "the requirements of the Act and its regulations pertaining to white-collar exemptions." Response at 8-9 & 9 n. 3.

*4 Neither party has presented sufficient evidence for the court to reach even an inconclusive determination as to whether the exempt classifications of all DPS employees resulted from an improper reliance on pay grade alone rather than on the requirements of the statute and regulations as they pertain to each position. Without some evidence that the determination was based upon pay grade or some other improper basis applied across-the-board, the court can only conclude that the determination to classify the positions of LPE II and LPE III as exempt was based on factors unique to that position or perhaps other closely related positions not identified in plaintiff's motion. The determination that an attorney is exempt as "professional," for example, presumably would be based on a completely different analysis than a similar determination for the position of LPE II or LPE III. The court finds no grounds for including all purportedly exempt DPS employees in the Opt-In Class absent some evidence that the classification of the numerous and varied positions had a common improper basis. Thus, unless plaintiff can present some credible evidence that the classification of LPE II and LPE III as exempt was based solely or primarily on pay grade or a similarly improper basis applied to numerous other positions in DPS, the court intends to limit the Opt-In Class to persons employed in the position of LPE II or LPE III.

Plaintiff similarly has failed to make any prima facie showing that he is similarly situated to any DPS employees other than other persons employed as LPE II or LPE III with regard to his alleged deprivation of compensation for on-call time. Plaintiff implies that he has raised an issue concerning whether defendants' "policy of denying pay" for on-call time violates the FLSA. Motion at 4. The court has searched in vain for any factual basis in plaintiff's complaint or motion, however, which would indicate that the DPS, much less the State of Arizona, has any centralized policy concerning pay for on-call status. In fact, the only evidence related to this issue, a memo from a DPS staff attorney to assistant directors, indicates that on-call restrictions are established by individual supervisors. Anderson Affidavit, Exhibit C. The memo does nothing more than provide general guidelines concerning the types of restrictions held by courts to make on-call time compensable. *Id.*

As defendants note, addressing the question of pay for on-call status requires a fact-intensive inquiry related to the peculiar characteristics of the position in question and the requirements of the employer. *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-37, 65 S.Ct. 161, 163 (1944). Plaintiff may be correct that the determination of whether pay for on-call status is required under the FLSA does not require a "job duties analysis." Motion at 11. The analysis required to determine whether the restrictions placed upon the employee are sufficient to require compensation, however, would be just as individualized and fact-intensive as a job duties analysis.

*5 The court recognizes the concept so strongly relied upon by plaintiff that approval of a notice and consent form does not require a determination that all persons receiving the notice are similarly situated to the plaintiff. The court does not interpret either *Sperling* or *Church*, however, as fostering the approach suggested by plaintiff: that the court authorize notice to the broadest possible class of plaintiffs, based solely on plaintiff's unsupported allegations, and decline to make even a preliminary determination of whether the potentially huge number of opt-in plaintiffs that may result actually are or may be similarly situated to the plaintiff. The court does not consider such an approach to be consistent with orderly management of the litigation, the recognized purpose for allowing early court-approved notice to potential plaintiffs. *Sperling*, 110 S.Ct. at 487.

Further, the court disagrees with plaintiff that *Church* is directly on point on the issues raised by this motion. In *Church*, the court rejected the notion that the class must be narrowly circumscribed to include only those occupying the same positions at the same locations as the named plaintiffs, reporting to the same supervisors or terminating employment for the same reason. *Church*, 137 F.R.D. at 308. The court held, however, that "[w]hat governs the scope of the class is whether the named plaintiffs and the class members were all affected by a similar plan

infected by discrimination." *Id.* The court determined that the plaintiffs in that case had alleged a sufficient factual basis to indicate a common scheme of terminating older employees to reduce the costs of severance benefits. *Id.* at 309. Unlike in *Church,* plaintiff has not provided a sufficient factual basis in this case to indicate that the employees he seeks to include in the Opt-In Class were "all affected by a similar plan" to deny them compensation for overtime and on-call status.

Until plaintiff provides some acceptable evidence [FN3] indicating that his exempt classification has the same or a similar improper basis as that of other DPS employees and/or that on-call compensation was determined pursuant to policies established by the LEMSC or another centralized decision-making body, the court will not include in the Opt-In Class any employees other than LPE II's and LPE III's. The court will, however, allow plaintiff to conduct discovery on these issues and will order defendants to respond promptly and fully to such requests. To the extent such information has previously been requested and responses are due or past due, the court will order defendants to produce the requested information immediately or show why they are unable to do so. In the meantime, plaintiff may at his option propose a revised form of notice and consent to be sent only to persons employed by the DPS as LPE II or LPE III, pending the court's determination of whether notice should be sent to a broader class of potential plaintiffs. The court will not, of course, require defendants to respond to discovery requesting the names and addresses of Opt-In Class members unless plaintiff voluntarily restricts that request to the names and addresses of persons employed as LPE II and LPE III or until the class has been finally defined, either by court order or by stipulation of the parties.

***6** IT IS ORDERED denying, without prejudice, plaintiff's motion to approve and authorize notice and to require defendants to provide the name and addresses of opt-in class members (Doc. No. 6).

IT IS FURTHER ORDERED granting defendants' motion to strike.

DATED this 29 day of July, 1992.

FN1. The statute provides in relevant part: Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their ... unpaid overtime compensation ... and in an additional equal amount as liquidated damages ... An action to recover [such] liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

FN2. The court has granted defendants' separate motion to strike portions of the affidavits of these individuals in which they state their understanding of the method by which DPS determined the exempt classifications and its similarity to the method employed by the State of Arizona outside the DPS.

FN3. The court emphasizes that it will not require plaintiff to provide the substantial evidence of such policies that can only be obtained after full discovery on the merits. The court finds, however, that to date plaintiff has provided essentially no evidence that exemption classifications of all DPS employees had a similar improper basis or that plaintiff's alleged deprivation of compensation for on-call status was the result of any "centralized decision-making process."

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CERTIFICATE OF SERVICE

I, Michael P. Kelly, hereby certify that a true and correct copy of Compendium to Defendants' Supplemental Brief in Further Support of its Opposition to Plaintiff's Expedited Motion to Conditionally Certify a FLSA Collective Action was served via e-file on this 3rd day of November, 2006, upon the following:

Vivian L. Rapposelli, Esquire (#3204)
Rapposelli, Castro & Gonzales
1300 Grant Ave., St. 100
Wilmington, DE 19806

/s/ Michael P. Kelly
Michael P. Kelly